129-372

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1226~~ 853

THE BANK OF FORT MADISON, APPELLANT,

vs.

PHILANDER M. ALDEN AND GEORGE S. ROBINSON, EXECUTORS OF JAMES S. WATERMAN, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 14, 1887.

accession 23875

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1 Pleas in the circuit court of the United States for the northern district of Illinois held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, judge of the circuit court of the United States for the seventh judicial circuit, on Monday, the eighth day of August, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and twelfth year.

WM. H. BRADLEY, *Clerk.*

THE BANK OF FORT MADISON
vs.
PHILANDER M. ALDEN and GEORGE S. ROBINSON, Executors of the Estate of James S. Waterman, Deceased. } In Chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the eleventh day of May, 1885, came the complainant, by its solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, its bond for costs; and also at the same time a transcript of record from the county court of De Kalb county, Illinois, in said above-entitled cause, which said bond and transcript are in the words and figures following, to wit:

2 *Bond for Costs.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court. — Term, A. D. 188–. In Equity.

THE BANK OF FORT MADISON
vs.
PHILANDER M. ALDEN and GEORGE S. ROBINSON, Executors, &c.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the said bank of any costs ordered or adjudged to be paid by it I hereby agree and stipulate that execution may issue against my property for any costs taxed against it.

Dated this 11th day of May, A D. 1885.

THEODORE SHELDON.

Endorsed: Filed May 11, A. D. 1885. Wm. H. Bradley, clerk.

3 *Record from County Court of De Kalb County.*

STATE OF ILLINOIS, } ss:
County of De Kalb, }

In County Court of De Kalb County, in Probate, March Term, 1885, begun and held at the court-house in Sycamore, in said county, on the third Monday, the same being the 16th day, of March, A. D. 1885.

Present: Hon. Luther Lowell, county judge; Lester P. Wood, sheriff.

Attest: CASSIUS M. CONRAD, *Clerk.*

Court opened by proclamation.

Be it remembered that on Monday, the 16th day of March, A. D. 1885, the *said* same being one of the days of the March term, A. D. 1885, the following, among other, proceedings were had in said court and entered of record in the words and figures following, to wit:

March Term, 1885.

THE BANK OF FORT MADISON, IOWA,

vs.

THE ESTATE OF JAMES S. WATERMAN, Deceased.

Claim, $72,366.14.

MONDAY, *March* 16, 1885.

On this day comes the claimant and presents to the court his demand against said estate for the sum of $72,366.14, which
4 claim was filed in this court February 17th, 1885; summons was issued and returned by the sheriff, served February 24, 1885, on Philander M. Alden, and March 16, 1885, on George S. Robinson, executors of said estate.

And on March 13, 1885, a petition for removal of cause to the United States circuit court for the northern district of Illinois and affidavit and bond were filed:

March Term, 1885.

THE BANK OF FORT MADISON, IOWA,

vs.

THE ESTATE OF JAMES S. WATERMAN, Deceased.

Claim, $72,366.14.

TUESDAY, *March* 17, 1885.

On this day comes the claimant and moves the court for removal of cause to the United States circuit court for the northern district of Illinois.

March Term, 1885.

THE BANK OF FORT MADISON, IOWA,

vs.

THE ESTATE OF JAMES S. WATERMAN, Deceased.

Claim, $72,366.14.

SATURDAY, *April* 11, 1885.

Continued.

April Term, 1885.

THE BANK OF FORT MADISON, IOWA,

vs.

THE ESTATE OF JAMES S. WATERMAN, Deceased.

Claim, $72,366.14.

THURSDAY, *May* 7, 1885.

5 And now come the executors of the said estate, and also comes The Bank of Fort Madison, by its attorney, and the court, having heard arguments thereon and being fully advised in the matter, doth order and decree that the petition of the said Bank of Fort Madison to remove the said suit into the circuit court of the United States in and for the northern district of Illinois be, and the same is hereby, granted and the bond filed, and surety therefor is approved.

Letters Testamentary.

STATE OF ILLINOIS, } *ss:*
De Kalb County, }

In County Court. September Term, 1883.

Estate of JAMES S. WATERMAN, Deceased.

The people of the State of Illinois to all to whom these presents shall come, Greeting:

Know ye that whereas James S. Waterman, late of the county of De Kalb and State of Illinois, died on or about the 19th day of July, A. D. 1883, as it is said, after having duly made and published his last will and testament, a copy whereof is hereunto annexed, leaving at the time of his death property in this State which may be lost, destroyed, or diminished in value if speedy care be not taken of the same, and inasmuch as it appears that Philander M. Alden and George S. Robinson have been appointed executors in and by the last will and testament to execute the same:

Now, to the end that the said property may be preserved for those who shall appear to have a legal right or interest therein, and that the said will may be executed according to the request of the
6 said testator, we do hereby authorize the said Philander M. Allen and George S. Robinson, as such executors, to collect

and secure all and singular the goods and chattels, rights and credits, which were of the said James S. Waterman at the time of his decease, in whosoever hands or possession the same may be found in this State, and well and truly to perform and fulfill all such duties as may be enjoined upon them by the said will, so far as there shall be property and the law charge them, and in general to do and perform all other acts which now are or hereafter may be required of them by law.

Witness Cassius M. Conrad, clerk of the county court of the said county of De Kalb, at his office in Sycamore, this 25th day of September, A. D. 1883, and the probate seal of said court hereunto affixed.

[SEAL.] CASSIUS M. CONRAD,
Clerk of the County Court.

(Endorsed:) Filed this 25th day of September, 1883, and recorded in book 3, page 150. C. M. Conrad, clerk.

7 STATE OF IOWA, } ss:
County of Lee, }

In the County Court of De Kalb County, State of Illinois.

Joseph A. Smith, cas., being duly sworn, deposes and says that the annexed claim against the estate of James S. Waterman, deceased, is just and unpaid, after allowing all just credits, and that the Bank of Fort Madison has no other claim against said estate.

JOSEPH A. SMITH, *Cas.*

Subscribed and sworn to before me this 14th day of February, A. D. 1885.

[L. S.] J. D. M. HAMILTON,
Notary Public.

Estate of James S. Waterman, Dr., in account with the Bank of Fort Madison.

To cash advances made between Nov. 3, 1879, and April 17th, 1880, to the Black River Lumber Company, now insolvent, and for which the said bank recovered judgment against the said lumber company in the circuit court of the United States for the western district of Wisconsin, January 17th, 1884, for which advances, judgment, and interest thereon the above estate is liable to the amount unpaid upon the capital stock of said lumber company held at the time of such advances by the late James S. Waterman or owned by the late firm of Ketcham & Waterman at the time of such advances, or arising from the statutory equity or common law liability of said Waterman or said firm, as officers or stockholders in said lumber company, and a portion of which said advances were secured by the note of the said lumber company, duly indorsed by the said firm, and a copy whereof is hereto annexed, which said judgment was for $72,366.14.

8 Copy.

No. 18. $10,000. FORT MADISON, *Mar.* 22*d*, 1880.

For value received, three months after date, the Black River Lumber Company promise to pay to the order of the Bank of Fort Madison ten thousand dollars, with interest at the rate of 8 per cent. per annum after maturity.

BLACK RIVER LUMBER COMPANY,
By W. H. KRETSINGER, *President.*

Attest: JOSEPH A. SMITH, *Tr.*

Indorsed: S. & J. C. Atlee, W. H. Kretisinger, Ketcham & Waterman, Welcome Hyde.

On the back of which document is the following endorsement: De Kalb county court. State of Illinois. In the matter of the estate of James S. Waterman, deceased. Claim of Bank of Fort Madison. Filed Feb. 17th, 1885. Cassius M. Conrad, clerk.

9 STATE OF ILLINOIS, *County of De Kalb:*

In the County Court thereof.

In the Matter of the Estate of JAMES S. WATERMAN, Deceased. *In re* Claim of Bank of Fort Madison.

I hereby enter myself security for all costs to accrue in the above-entitled cause.

Dated February 18th, 1885.

THEODORE SHELDON.

Endorsed as follows: County court De Kalb Co., Illinois. In matter of estate of J. S. Waterman, deceased. *In re* claim of Bank of Fort Madison. Bond for costs. Filed February 17th, 1885. C. M. Conrad, clerk.

STATE OF ILLINOIS, } *ss:*
De Kalb County, }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Philander M. Alden and George S. Robinson, executors of the last will and testament of James S. Waterman, deceased, if they shall be found in your county, personally to be and appear before the county court of said De Kalb county on the first day of the next term thereof, to be holden at the court-house in Sycamore, in said De Kalb county, on the third Monday of March, 1885, to answer unto the Bank of Fort Madison
10 in matter of claim this bank filed against said estate; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Cassius M. Conrad, clerk of our said court, and the seal thereof, at Sycamore aforesaid, this 17th day of February, A. D. 1885.

[L. S.] C. M. CONRAD, *Clerk.*

Endorsed.

STATE OF ILLINOIS, *De Kalb County,* } ss:

I have duly served the within by reading the same to the within-named Philander M. Alden, February 24th, 1885, and George S. Robinson, March 16, 1885, as I am therein commanded.

L. P. WOOD, *Sheriff.*

Fees	1 30
4 miles	20
Return	10
	$1 60

Filed in said court this 16 day of March, A. D. 1885.

C. M. CONRAD, *Clerk.*

Petition for Removal to Federal Court.

STATE OF ILLINOIS, *County of De Kalb:*

In the County Court thereof.

In the Matter of the Claim of THE BANK OF FORT MADISON

against

THE ESTATE OF JAMES S. WATERMAN, Deceased.

To the honorable the said court:

11 Your petitioner, the Bank of Fort Madison, respectfully shows that it is plaintiff in the foregoing-entitled suit, and that the same was by it commenced on or about the 17th day of February, A. D. 1885, in the said court; that your petitioner was at the time of bringing said suit and still is a citizen of the State of Iowa and a resident thereof, being a corporation created by and existing under the laws of the said State of Iowa.

Your petitioner further shows that there is and was at the time said suit was brought a controversy therein between your petitioner and the estate of the said James S. Waterman, deceased; that the said James S. Waterman was at the time of his death a citizen of the State of Illinois and a resident thereof; that Philander M. Alden and George S. Robinson, sole executors of the estate of the said James S. Waterman, deceased, and each of them, were at the time of bringing said suit and still are citizens of the State of Illinois and residents thereof; that said action was brought by your petitioner to recover sundry advances and loans made by it to the Black River Lumber Company, the nature of which is more fully set forth in the claim heretofore filed herein, and that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner further represents that this suit has not been tried, but is now pending for trial in this court, and that your petitioner desires to remove the same into the circuit court of the United

States in and for the northern district of Illinois, in pursuance of the act of Congress in that behalf provided, to wit, the Revised Statutes of the United States, section 639, subdivision 3.

12 Your petitioner further says that it has filed the affidavit required by the statute in such cases and offers herewith its bond, executed by Theodore Sheldon, of Chicago, Illinois, as surety, in the penal sum of two hundred and fifty dollars, conditioned as by said act of Congress required. Your petitioner therefore prays that the said bond may be accepted as good and sufficient according to the said act of Congress, and that the said suit may be removed into the next circuit court of the United States in and for the northern district of Illinois, pursuant to the aforesaid act of Congress in such case made and provided, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray.

THE BANK OF FORT MADISON,
Petitioner,
By THEODORE SHELDON, *Its Attorney.*

HENRY STRONG, *Of Counsel.*

STATE OF ILLINOIS, }
County of De Kalb, } *ss:*

Theodore Sheldon, being duly sworn, says that he is one of the attorneys for the petitioner in the foregoing petition named, that he has read said petition, and that the statements therein contained are true, as he verily believes.

THEODORE SHELDON.

Subscribed, and sworn to before me this twelfth day of March, A. D. 1885.

[L. S.] ROBSON WEDDELL,
Notary Public.

13 Endorsed as follows: De Kalb county court. Bank of Fort Madison *vs.* Estate of J. S. Waterman, deceased. Petition for removal of cause. Filed March 13th, 1885. C. M. Conrad, clerk.

Application for Removal of Cause to Federal Court.

STATE OF ILLINOIS, }
County of De Kalb, } *ss:*

In the County Court thereof.

In the Matter of the Claim of THE BANK OF FORT MADISON, IOWA,
against
THE ESTATE of JAMES S. WATERMAN, Deceased.

STATE OF IOWA, }
County of Lee, } *ss:*

I, Charles Brewster, being duly sworn, do say that I am the presi-

dent of the Bank of Fort Madison, a corporation created by and existing under the laws of the State of Iowa, the claimant or plaintiff in the above-entitled cause; that I am duly authorized by the said bank to make this affidavit; that I have reason to believe and do believe that from prejudice and local influence the said bank will not be able to obtain justice in said State court.

CHARLES BREWSTER,
Pres't of the Bank of Fort Madison.

Subscribed and sworn to before me this 23rd day of Feb'y, A. D. 1885.

[L. S.] J. B. McNAMARA,
Cl'k Dist. Court,
By W. S. LOWREY, *Dep'ty.*

14 Endorsed as follows: county court De Kalb County. The Bank of Fort Madison against Estate of J. S. Waterman, deceased. Affidavit for removal. Filed March 13th, 1885. C. M. Conrad, clerk.

Know all men by these presents that we, The Bank of Fort Madison, as principal, and Theodore Sheldon, of the city of Chicago, in the county of Cook and State of Illinois, as surety, are held and firmly bound unto Philander M. Alden and George S. Robinson, executors of the estate of James S. Waterman, deceased, in the penal sum of two hundred and fifty dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves and our heirs, executors, or administrators, jointly and severally and firmly by these presents.

Witness our hands and seals this twenty-first day of February, A. D. 1885.

The condition of this obligation is such that if the above-bounden The Bank of Fort Madison shall enter and file or cause to be entered and filed in the next circuit court of the United States in and for the northern district of Illinois, on the first day of its next session, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the county court of De Kalb county, State of Illinois, in which The Bank of Fort Madison is plaintiff and executors of the estate of said James
15 S. Waterman, deceased, defendants, and shall do such other appropriate acts as by the acts of Congress in that behalf are required to be done upon the removal of such suit from said State court into the United States court, then this obligation to be void; otherwise of force.

[Bank has no seal.]

THE BANK OF FORT MADISON,
By CHARLES BREWSTER, [SEAL.]
Its President.
THEODORE SHELDON. [SEAL.]

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Theodore Sheldon, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the said county and State and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the said State of Illinois liable to execution of the value of more than five hundred dollars.

THEODORE SHELDON.

Subscribed and sworn to before me this 12th day of March, A. D. 1885.

[L. S.] ROBSON WEDDELL,
Notary Public.

Endorsed as follows: County court of De Kalb county. The Bank of Fort Madison *vs.* Estate of James S. Waterman, deceased. Removal of cause. Bond. Filed this 13th day of March, 1885. C. M. Conrad, clerk.

16 *Claim of the Bank of Fort Madison, Iowa.*

In the Matter of the Estate of JAMES S. WATERMAN, Deceased.

And now comes the executors of the said estate and also comes The Bank of Fort Madison, by its attorney, and the court, having heard arguments thereon and being fully advised in the matter, doth order and decree that the petition of the said Bank of Fort Madison to remove the said suit into the circuit court of the United States in and for the northern district of Illinois be, and the same is hereby, granted, and the bond filed and surety therefor is approved.

L. LOWELL,
Co. Judge De Kalb Co.

Endorsed as follows: Bank of Fort Madison *vs.* Estate of J. S. Waterman, deceased. Order for removal of cause to U. S. court. Filed May 7th, 1885. C. M. Conrad, clerk.

17 STATE OF ILLINOIS, } ss:
County of De Kalb, }

I, Cassius M. Conrad, clerk of the county court in and for the county and State aforesaid, do hereby certify that the above and foregoing is a full, true, and correct copy of the record of all proceedings had in said court wherein The Bank of Fort Madison, Iowa, is claimant, and the Estate of James S. Waterman, deceased, defendant, and of the following-named original papers in said cause, to wit: "Claim of Bank of Fort Madison," "bond for costs," "summons," "petition for removal of cause," "affidavit for removal," "bond for removal of cause," "order for removal;" also letters testamentary in said estate.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Sycamore, in said county, this 9th day of May, A. D. 1885.

[SEAL.] CASSIUS M. CONRAD, *Clerk.*

Costs:

C. M. Conrad, clerk county court, fees $4 75
L. P. Wood, sheriff, fees 1 60

Endorsed: Filed May 11, 1885. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 28th day of January, 1886, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

18 In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

BANK OF FORT MADISON

vs.

PHILANDER M. ALDEN, GEORGE S. ROBINSON, Ex'rs Est. Jas. S. S. Waterman, Deceased.

It is hereby stipulated and agreed that the complainant may file its bill of complaint as repleader in the above-entitled cause, and that respondents shall demur, plead, or answer thereto within twenty days from date hereof.

Chicago, December 30th, 1885.

THEODORE SHELDON,
Sol'r for Compl't.
WILSON & MOORE,
Sol'rs for Def'ts.

Endorsed: Filed Jan'y 28, 1886. Wm. H. Bradley, clerk.

On the same day, to wit, on the 28th day of January, 1886, came the complainant, by its solicitor, and filed in said clerk's office its bill of complaint in said entitled cause, which said bill is in the words and figures following, to wit:

19 *Bill of Complaint.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the Circuit Court of said District. In Equity.

To the judges of the circuit court of the United States for the northern district of Illinois:

The Bank of Fort Madison, a corporation organized under the laws of the State of Iowa and a citizen of that State, having its principal and only office in the city of Fort Madison, in said State, brings this its bill against Philander M. Alden and George S. Robinson,

executors of the estate of James S. Waterman, deceased, who are severally citizens of the State of Illinois, as was also the said James S. Waterman during his lifetime and at the time of his death.

And thereupon your orator complains and says that on or about the third day of November, 1879, and under the general laws of the State of Wisconsin then in force relating to the formation of private corporations, reference being thereunto had for greater certainty, there was duly formed a body corporate under and by the name of "The Black River Lumber Company," with a capital stock
20 of four hundred and thirty-seven thousand five hundred dollars, divided into four thousand three hundred and seventy-five shares of one hundred dollars each; that all the capital stock of said corporation was subscribed for on said day; that twelve hundred and fifty shares of said stock were then subscribed for by said James Waterman, and for which certificates of stock were thereupon or shortly thereafter issued to said James S. Waterman, which said stock said Waterman continued to own up to the time of his death; that at the same day a meeting of said subscribers, as stockholders of the said Black River Lumber Company, was held in the city of La Crosse, in said State, wherein was then located the principal office of said company, an organization of said company was accomplished, officers elected, and a board of directors constituted, of which said Waterman was made member.

That said Waterman never at any time paid any cash upon his said subscription; that the sole contribution said Waterman ever made thereto was a conveyance of certain tracts of pine lands in said State of Wisconsin to a trustee for the use of said corporation upon certain conditions therein mentioned; that the actual cash value of said lands so conveyed at the time of said conveyance or at any time thereafter did not exceed forty per centum of the amount subscribed by said Waterman to the capital stock of said corporation; that said pine lands were never conveyed by said trustee to said corporation, but were subsequently reconveyed by said trustee with the consent of the other stock subscribed to said Waterman.

And your orator further shows that at divers times between the said 3rd day of November, 1879, when said corporation was organized as aforesaid, and the 29th day of March, 1880, your orator had advanced to the said Black River Lumber Company, at its
21 request and for the purpose of defraying its running expenses, about the sum of sixty-five thousand dollars; that on or about said 29th day of March, 1879, the said Black River Lumber Company, to secure the amount so advanced by your orator and other amounts to be advanced by your orator, executed a chattel mortgage or defeasible bill of eale conveying to your orator both the title to and immediate possession of the logs and lumber belonging to the said Black River Lumber Company, in the said State of Wisconsin, defeasible upon condition that said Black River Lumber Company should repay to your orator the moneys so advanced and moneys which your orator should thereafter advance, and should also pay to certain other creditors certain sums therein specified, as well as

all other debts and obligations contracted by said Black River Lumber Company,

And your orator further shows that your orator thereupon took possession of the property so conveyed and incurred other expenses amounting to more than twenty thousand dollars ($20,000) in bringing said logs into the market.

That on or about the 8th day of April, 1880, Henry Ketcham and Myron M. Ketcham, being two of the stockholders of said Black River Lumber Company, both being residents of the State of Wisconsin, exhibited their bill of complaint in the circuit court of La Crosse county, in said State of Wisconsin, making your orator and the said Black River Lumber Company and all the subscribers to the capital stock of said company excepting the complainant's therein and said James S. Waterman parties defendant thereto.

That the allegations of said bill of complaint were substantially as follows: That said Black River Lumber Company was not insolvent; that said company was not indebted to your orator in
22 the sum of $65.000; that said chattel mortgage was invalid by reason of informal execution; that the same was a fraud upon the said company; that a continued possession by your orator of the property mortgaged as aforesaid would cause serious injury to the interests of said company; that three of the members of the board of directors of said company conspired with certain stockholders of said company to divert the property of said company to their own uses; that said bill of complaint prayed that said chattel mortgage might be declared invalid; that the property of said corporation be restored to the Black River Lumber Company; that pending said action a receiver be appointed to take charge of the logs, lumber, and other property of said corporation, and that your orator should be restrained from interfering with the property of said corporation.

And your orator further shows that on the 17th day of April, 1880, the parties to said suit by stipulation agreed that a receiver be appointed of the property and effects of said corporation to sell and dispose of the same, to apply the proceeds in payment of the debts of said corporation in such order of preference as the court might direct; that the chattel mortgage to your orator be cancelled, and that upon the discharge of the debts of the corporation said receiver should turn over the residue of such property undisposed of to the said Black River Lumber Company; that a receiver was accordingly appointed; that subsequently, upon petition of your orator, the said suit was removed from the said circuit court of La Crosse county to the circuit court of the United States for the western district of Wisconsin; that said suit proceeded in said last-mentioned court without repleader and upon the original bill of complaint and the answer of your orator denying the allegations of said bill in so far as
23 said bill impeached the validity of said chattel mortgage, which said validity was the only issue involved in the said litigation.

And your orator further shows that by further stipulation of the parties to said suit, on October 26, 1880, all the claims against said com-

pany were disposed of, excepting only the claim of your orator and the claim of one Milo Smith; that there then remained a surplus fund in the hands of the receiver, which said fund was claimed both by your orator and by said Milo Smith; that subsequently, on the 8th day of March, 1882, said Milo Smith released his said claim; that a final decree was entered in said suit in said circuit court of the United States for the western district of Wisconsin on the 18th day of January, 1884, wherein it was found that your orator was the only remaining unpaid creditor who had proved a claim against the fund in the hands of said receiver; that there was then owing to your orator from the said Black River Lumber Company the sum of seventy-two thousand three hundred and sixty-six dollars and fourteen cents, being eighty-three thousand six hundred and eighty-two dollars and ninety-four cents less eleven thousand three hundred and sixteen dollars and eighty cents, the principal and interest of ten thousand dollars paid thereon by the receiver April 25th, 1882; that the said receiver turn over to your orator the remainder of the said funds in the hands of the receiver, amounting to eleven thousand seven hundred and seventy dollars and sixty-one cents, to be endorsed upon certain unsecured notes and drafts, held by your orator, described in said decree, as will more fully appear from the said decree, a copy of which is hereto attached and marked Exhibit "A," and which your orator prays may be considered a part of this bill.

And your orator further shows that your orator's said claim against the said Black River Lumber Company is evidenced
24 by the following notes now held and owned by your orator, all bearing eight per centum after maturity:

Payor.	Payee.	Date due.	Amount.
Black River Lumber Co.	J. A. Smith, cas.	Nov. 3, 1879, 6 mos.	2,000 00
" " " "	Chas. Brewster	" 12, 1879, 6 "	5,000 00
" " " "	W. H. Kretsinger	Dec. 6, 1879, 6 "	5,000 00
" " " "	Bank Fort Madison	" 22, 1879, 6 "	2,000 00
" " " "	S. & J. C. Atlee	" 31, 1879, 6 "	5,000 00
" " " "	Bank Fort Madison	Jan. 12, 1880, 6 "	2,000 00
" " " "	W. H. Kretsinger	" " " 6 "	1,000 00
" " " "	S. & J. C. Atlee	" " " 6 "	2,000 00
" " " "	Bank Fort Madison	" " " 4 "	1,250 00
" " " "	W. H. Kretsinger	" " " 4 "	1,250 00
" " " "	S. & J. C. Atlee	" " " 4 "	2,500 00
" " " "	" " "	Mar. 5, 1880, 4 "	5,000 00
" " " "	Bank Fort Madison	" " " 4 "	2,500 00
" " " "	W. H. Kretsinger	" " " 4 "	2,500 00
" " " "	Bank Fort Madison	" 22, " 3 "	10,000 00
" " " "	Bank Fort Madison	" 31, " 3 "	10,000 00
" " " "	S. & J. C. Atlee	Apr. 8, 1880, 3 "	5,000 00
" " " "	Jos. A. Smith, cas.	May 4, 1880, 1 day	1,011 64
" " " "	Bank Fort Madison	June 5, 1880, 1 day	1,342 97

25 And your orator further shows that no payments have been made upon said notes other than the payments made by said receiver as recited in said decree; that the said note of March 22, 1880,

for $10,000, of which your orator is payee and the said Black River Lumber Company, the maker, bears upon the back thereof and is secured by the guarantee of the firm of Ketcham & Waterman; that said firm was composed of the said Henry Ketcham and the said James S. Waterman, deceased; that said Ketcham is a resident of the State of Wisconsin, and is, as your orator is informed, insolvent, and was at the time of the execution of said note and ever since has been insolvent; that said note was duly protested upon the non-payment thereof, as will more fully appear from the instrument of protest attached to said note, ready to be produced in this court upon the hearing.

And your orator further shows that said James S. Waterman was not a party to the suit above mentioned and was during the continuance thereof without the jurisdiction as well of the said circuit court of the United States for the western district of Wisconsin as of the said circuit court of La Crosse county.

And your orator further shows that on or about July 19th, 1883, the said James S. Waterman, then and for many years prior thereto a citizen of the State of Illinois, departed this life, having theretofore made his last will and testament in writing, in and by which the defendants were appointed executors thereof, and that thereupon the said defendants duly proved the said last will and testament in and before the county court of De Kalb county, in the State of Illinois, and having duly qualified as such executors have taken upon themselves the execution thereof, and are now acting as such.

26 And your orator further shows that from and ever since the 17th day of April, 1880, the said Black River Lumber Company has been and is insolvent, and from and ever since said last-named date has neglected and refused to pay and discharge its notes and other evidences of indebtedness, and from and ever since said date has suspended its ordinary and lawful business and still suspends the same, and by reason whereof and in accordance with section 1763 of the Revised Statutes of Wisconsin for the year 1878 the said corporation has surrendered the rights, privileges, and franchises granted or acquired under any law, and is now and has been since April 17, 1882, dissolved and without existence, and by reason whereof your orator has been since said April 17, 1882, and is now unable to obtain a judgment at law against the said Black River Lumber Company.

Your orator further shows that your orator is the only remaining unpaid creditor of the said Black River Lumber Company.

In consideration whereof, and to the end that the said Philander M. Alden and George S. Robinson, executors of the estate of James S. Waterman, deceased, may without oath (their oaths and the oaths of each of them being hereby waived), in pursuance of the statute in such case made and provided, full, true, direct, and perfect answer make to all and singular the matters and things hereinbefore stated and charged, and that they may particularly answer how much was paid in by said James S. Waterman or by them upon his said subscription, and that an account may be taken of the amount paid by the said James S. Waterman upon his said subscription and of the

amount yet unpaid thereon, and of the amount due from the said Black River Lumber Company to your orator—

And that the said defendants, as executors, may be decreed to pay, in due course of administration, so much of the balance found unpaid on the stock subscription of said James S. Waterman as
27 will be sufficient to pay the indebtedness of said company due to your orator—

And that an account may be taken of the sum now due upon the said note of March 22nd, 1880, guaranteed as foresaid by the firm of Ketcham & Waterman, and that the said defendants may be decreed to pay to your orator the sum so found to be due in the course of administration—

And that your orator may be further and otherwise relieved in the premises as the nature of the case may require and according to equity and good conscience may seem proper:

May it please your honors to grant unto your orator the usual process issuing out of and under the seal of this honorable court, to be directed to the said Philander M. Alden and George S. Robinson, therein and thereby commanding them, on a certain day and under a certain penalty to be therein inserted, that they personally be and appear before this honorable court, then and there to answer the premises and to stand to and abide by and perform such order and decree therein as to this court shall seem proper and shall be agreeable to equity and good conscience.

And your orator will ever pray, etc.

THE BANK OF FORT MADISON,
By THEODORE SHELDON,
Its Solicitor.

THEODORE SHELDON, *Solicitor.*
THOMAS D. JONES, *Of Counsel.*

28 Circuit Court of the United States, Western District of Wisconsin.

HENRY KETCHAM and MYRON M. KETCHAM, Pl't'ffs,

vs.

THE BLACK RIVER LUMBER COMPANY *et al.*, Def'ts.

At a general term of said court held in Madison, commencing on the fourth day of December, 1883, as yet of said term and upon the 18th day of January, 1884, the above cause coming on for hearing for final decree upon the testimony taken by the Bank of Fort Madison in support of its claim set forth in its answer and upon the verified report and petition for final discharge of William R. Sill, receiver of the Black River Lumber Company, the court having heard counsel for said receiver and on behalf of said bank, upon consideration of said report and the report of Frank M. Stewart, master, upon the accounts of the receiver since June 12th, 1883, and upon the said testimony:

It is, therefore, adjudged and decreed that the claim of the Bank

of Fort Madison be and the same is adjusted and allowed at the sum of seventy-two thousand three hundred and sixty-six dollars and fourteen cents, being eighty-three thousand six hundred and eighty-two dollars and ninety-four cents less eleven thousand three hundred and sixteen dollars and eighty cents, the principal and interest of ten thousand dollars, paid thereon by the receiver April 25th, 1882.

It is further ordered, adjudged, and decreed that he pay to Cameun, Losey, and Bunn, his counsel, the sum of two hundred and fifty dollars and his proper disbursements and expenses attendant upon his final accounting, not to exceed twenty-five dollars.

That the said bank is the only remaining creditor of said Black River Lumber Company who has presented or filed his claim for allowance and payment under the receivership, and that all other creditors and all such as have not filed their claims be barred and cut off from any participation in the funds in the hands of the receiver; that the said receiver be, and he is hereby, directed to turn over to said bank the logs remaining in his hands at the sum of four hundred dollars and his account against S. and J. C. Atlee, at the sum of eleven thousand two hundred and fifty-five dollars and sixty-one cents, and to release his claims against said bank of one hundred and twenty-five dollars, bid by the said bank at the public sale of assets of the receiver held upon January 9th, 1884, and said sums to be endorsed and applied upon the unsecured notes and drafts held by said Bank of Fort Madison, given by the Black River Lumber Company, specified as follows: Draft, Robert B. Smith on Joseph A. Smith, date April 3rd, 1880, payable to order of Cargill and Van, principal and interest now due, twelve hundred seventy-four dollars and eleven cents; 2nd, draft, Robert B. Hatch on Joseph A. Smith, cashier, date April 5th, 1880, due 60 days, payable order Lloyd and Clark, principal and interest now due, $1,682.21; next, on note given by said B. R. L. Co. to the order of S. & J. C. Atlee, dated April 8th, 1880, payable ninety days after date, with interest at eight per cent. per annum, for five thousand dollars; next, note of said company, date M'ch 22, 1880, amount ten thousand dollars, at 8 per cent. per annum after maturity, due in three months; payable to order of Bank of Fort Madison.

It is further adjudged and decreed that thereupon all the transactions and doings of the receiver as such be, and the same are hereby, satisfied and approved; that his accounts are finally allowed and passed as heretofore allowed and passed by interlocutory orders and decrees; that he be, and is hereby, relieved and discharged from his trust as receiver and from all further duties or obligations in the premises; that his bondsmen as receiver are relieved and discharged from all liability for further or future acts of the receiver; that the public sale of the receiver held on January 9th 1884, be, and the same is hereby, ratified and confirmed, and the receiver is authorized and directed to credit the account of Wing and Prentiss, as it appears on the books of the Black River Lumber Company, with fifteen hundred and eighteen dollars and eighty cents to balance the same; and it is further ordered

that the receiver deduct from moneys in his hands the costs and disbursements to be taxed.

Dated Jan'y 18th, 1884.

By the court:

(Signed) ROMANZO BUNN, *Dist. Judge.*

UNITED STATES OF AMERICA, }
Western District of Wisconsin, } *ss:*

I, H. J. Peck, clerk of the circuit court of the United States of America for the western district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate and they are true copies of their respective —.

UNITED STATES OF AMERICA, }
Western District of Wisconsin, } *ss:*

I, Harvey J. Peck, clerk of the circuit court of the United States of America for the western district of Wisconsin, do hereby certify that I have compared the writings annexed to this certifi-
31 cate, and they are true copies of their respective originals, and are correct transcripts therefrom and of the whole thereof, now on file and remaining of record in my office.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of La Crosse, in the said western district of Wisconsin, this 19th day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the said United States the one hundred and —.

[SEAL.] H. J. PECK, *Clerk.*

(Endorsed:) Filed Jan'y 28, 1886. Wm. H. Bradley, clerk.

On the same day, to wit, on the 28th day of January, 1886, came the defendants, by their solicitors, and filed in said clerk's office their demurrer to the bill in said entitled cause, which said demurrer is in the words and figures following, to wit:

32 *Bill.*

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of said District. In Equity.

THE BANK OF FORT MADISON
vs.
PHILANDER M. ALDEN and GEORGE S. ROBINSON, Executors.

The demurrer of Philander M. Alden and George S. Robinson, executors, &c., to the bill of complaint of The Bank of Fort Madison, complainant.

These defendants, respectively, by protestation, not confessing or

acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainant hath not by its said bill made such a case as entitles it in a court of equity to any relief from or against these defendants touching the matters contained in the said bill or any of such matters:

Wherefore and for divers other good causes of demurrer appearing in the said bill of complaint these defendants demur to the said bill and to all the matters and things therein contained, and humbly pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said
32½ bill, and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

PHILANDER M. ALDEN.
GEORGE S. ROBINSON.

I certify that, in my opinion, the foregoing demurrer of Philander M. Alden and George S. Robinson, defendants, to the bill of complaint of The Bank of Fort Madison, complainant, is well founded in law and proper to be filed in the above cause.

JOHN P. WILSON,
Sol'r for Def'ts.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

—— ——, being duly sworn, deposes and says that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

PHILANDER M. ALDEN.

Subscribed and sworn to before me this thirteenth day of January, A. D. 1886.

[SEAL.] M. L. RAFTREE,
Notary Public.

Endorsed: Filed Jan'y 28, 1886. Wm. H. Bradley, clerk.

33 Afterwards, to wit, on the nineteenth day of April, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

BANK OF FORT MADISON
vs. } In Chancery.
PHILANDER M. ALDEN *et al.*, Executors, &c.

Now come the defendants, by their solicitor-, and by leave of court withdraw their demurrer to the fiill herein, and leave is hereby given them to answer in thirty days.

Afterwards, to wit, on the nineteenth day of May, 1886, came the defendants, by their solicitors, and filed in said clerk's office their answer in said entitled cause, which said answer is in the words and figures following, to wit:

34 *Claim against Estate, Removed from County Court of De Kalb County.*

UNITED STATES OF AMERICA:

Circuit Court for the Northern District of Illinois. — Term, 1886.

THE BANK OF FORT MADISON

vs.

PHILANDER M. ALDEN and GEORGE S. ROBINSON, Executors.

The joint and several answers of the said defendants to the petition or repleader of the claimant herein.

The said defendants, for answer to the bill of complaint or petition herein, answering, say they admit that the Black River Lumber Company was organized in substantially the manner and at about the time stated in said petition, and that upon the organization thereof the said James S. Waterman subscribed for certain stock therein, but defendants, having no personal knowledge of the matter, neither admit nor deny the allegations of said petition as to the amount subscribed for by said Waterman, but call for proof thereof.

And defendants deny that said Waterman, as his sole payment upon said subscription, contributed certain pine lands not worth exceeding forty per cent. of his said subscription, and deny that said lands were never conveyed to said corporation, but, on the contrary, aver the facts to be that the said Waterman was at the time of his subscription for said stock the owner of a large amount of pine lands in the State of Wisconsin worth about $250,000, but
35 subject to an incumbrance of some $75,000; that said corporation, being then organized for the purpose of dealing in such lands and cutting and transporting to market pine timber of the kind and quality so owned by him, purchased from him said lands, being of such value and subject to said incumbrance, for the sum of one hundred and twenty-five thousand dollars, and took a conveyance thereof to James M. Beck, as trustee for said company, and with the consent of said Waterman applied the same to the payment of his said subscription, and thereupon he was credited in due form on the books of said company with said sum of $125,000, and a paid-up certificate of stock was issued to him for the number of shares subscribed by him; and afterwards and by request of said corporation, by resolution of its board of directors, said trustee conveyed said lands to said company, which said conveyance was the only one said trustee ever made of any part of said lands, so far as defendants are aware.

And defendants further aver that the petitioner herein is a corporation or association for banking purposes, and was at the time of

all the transactions in said petition and this answer thereto set forth and stated, and at the date of the organization of said lumber company and ever since has been composed of and owned and managed solely by Joseph A. Smith and Charles Brewster, who were at the date of the organization of said lumber company and have been at all times since the cashier and president, respectively, of petitioner, and were at said time and times, as defendants are informed and believe, in some way, but in what way defendants are not
36 informed, jointly interested in business with J. C. Atlee, Samuel Atlee, and William H. Kretzinger; all of whom were co-subscribers with the said James S. Waterman for the stock of said company, and subscribed therefor, respectively, the number of shares following:

J. C. Atlee	468 shares.
Samuel Atlee	469 "
Charles Brewster	235 "
Joseph A. Smith	235 "
William H. Kretzinger	468 "

And that at the time of their said respective subscriptions the said parties, so named, were joint or several owners or jointly or severally interested, as defendants are informed and believe, in a large amount of pine land in the State of Wisconsin, the value of which these defendants cannot state, but which was at said time encumbered for a considerable sum, the amount whereof defendants cannot state; that upon the organization of said corporation they, the parties above named, sold and conveyed said pine lands to James M. Beck, as trustee for said Black River Lumber Company, for the sum of one hundred and eighty-seven thousand and five hundred dollars, but subject to the incumbrance above mentioned. These defendants do not know whether or not said lands were at said time of a value equal to the sum for which the same were so sold to said company, but aver that the same were accepted by said com-
37 pany in the same manner as the land conveyed by said Waterman, as above described, and the price thereof, as above stated, was credited upon their corporate books to the parties above mentioned, respectively, in the following amounts and at the following dates:

Nov. 3d, 1879. J. C. Atlee was credited with real estate	$46,800 00
Nov. 3d, 1879. Samuel Atlee was credited with real estate	46,900 00
Nov. 3d, 1879. Charles Brewster was credited with real estate	23,500 00
Nov. 3d, 1879. Joseph A. Smith was credited with real estate	23,500 00
Nov. 3d, 1879. W. H. Kretzinger was credited with real estate	46,800 00

That H. Ketchum and M. M. Ketchum, who were also subscribers to said stock to the amount of 625 shares each, likewise conveyed

to James M. Beck, as trustee for the said company when organized, pine lands in the State of Wisconsin which purported to be of the value of $125,000, and were accepted by the said company and credited to the said H. Ketchum and M. M. Ketchum, respectively, at that amount, one-half to each; but defendants do not know whether or not the said lands were in fact worth said sum at said time.

Further answering, defendants aver and charge that, upon the conveyance above mentioned, certificates of stock in said company were duly issued to the said Waterman and to the others of said subscribers, representing that each of said subscribers had fully paid his said subscription and was the owner of the shares so subscribed by him.

And defendants further aver, and will prove upon the hear-
38 ing hereof, that all of said parties above named being stockholders of said corporation were present at a meeting of the stockholders of said company held after said conveyances of lands had been made to the said Beck as trustee and credited as aforesaid, and voted to issue said certificates of stock, and afterwards, at other meetings of said stockholders and at other times and in other ways, assented to said purchases of lands and the credits therefor and ratified and adopted the same.

And defendants further say that the value of the pine lands so conveyed by said Waterman and said other subscribers to said stock was agreed on by and between all of the subscribers to the stock of said company, including said Brewster and said Smith, both before and after the organization of said company, and that said company was organized and said pine lands conveyed to said Beck as trustee in pursuance of said agreement as hereinbefore stated; that none of the subscribers to the stock of said company paid any cash upon their stock subscriptions, but all of said subscriptions were paid solely in the manner hereinbefore stated; that all of said lands so conveyed by the several subscribers to said Beck as trustee for said company were taken upon the basis of the valuation so agreed upon between said subscribers, and if it shall turn out that the value or price allowed said Waterman for his said lands so conveyed was excessive the same excess will be found in the price or value at

which the other lands were conveyed by the other subscribers
39 to said Beck as trustee, but these defendants charge that whatever advances, if any, were made by said petitioner to said lumber company were made by it through and on behalf of said Smith and Brewster with full knowledge of the facts above stated, and that said petitioner, as well as said Smith and Brewster, is bound by the valuation so placed, as above stated, upon the pine lands conveyed by said Waterman to said Beck for said lumber company, and is in equity estopped from questioning the same; but if it should be determined upon the hearing hereof that said Waterman ought to account to petitioner for any deficiency in payment of his said subscription by reason of said lands so conveyed by him being of insufficient value, then defendants insist that said Charles Brewster, Joseph A. Smith, J. C. Atlee, Samuel Atlee, and Wm. H. Kretzinger should likewise account for a like defi-

ciency, and for that purpose are necessary parties to any proceeding for that purpose, and petitioner should be required to bring them in.

That on April 20th, 1881, after the commencement of the litigation mentioned in said petition, and while the receiver appointed therein was still in possession of the property of said company, under the direction of the circuit court of the United States for the western district of Wisconsin, and after all the debts of said company had been paid, except the claim of the complainant here and the claim of the said Milo Smith, the said parties above named being still stockholders of said company, and the said J. C. Atlee
40 and Charles Brewster being then two of the directors thereof, a meeting of the stockholders of said company was held at La Crosse, Wisconsin, at which were personally present the said John C. Atlee, Charles Brewster, and others; that at said meeting the said John C. Atlee held a power of attorney from said Samuel Atlee to vote for him upon his 469 shares of the stock of said company; the said Charles Brewster, at the same meeting, held a power of attorney from the said Joseph A. Smith to vote for him upon his 235 shares, and F. S. Kretzinger was present and held a power of attorney, at the same meeting, for said William H. Kretzinger to vote for him upon his 469 shares; that at said meeting the said Charles Brewster offered a resolution as follows: "Resolved, That in the opinion of the stockholders of the Black River Lumber Company represented in this meeting and voting hereon that it is expedient and for the best interests of the stockholders and creditors of said company that a division of the lands of the company should be had, and the same redeeded to the several parties entitled thereto, as shown by the stock representing the interest of the several parties now therein, or to whom they direct."

That the said Jno. C. Atlee moved the adoption of said resolution, and all the stock represented, including the said owners and president and cashier of complainant bank, voted for it, one Welcome Hyde only voting in the contrary.

And afterwards, on April 27th, 1881, at an adjourned meeting of said stockholders, at which the same stockholders were
41 present and the same stock represented, it was resolved that the trustees be directed to reconvey to said J. C. Atlee, Samuel Atlee, W. H. Kretzinger, Charles Brewster, and Joseph A. Smith all the lands they had conveyed to him as above mentioned, and to the other parties likewise; and afterwards, on several occasions, the board of directors of said company, being duly met for business, approved and ratified said resolutions.

And afterwards, about April 14th, 1882, at the request of the board of directors of the said Black River Lumber Company, by resolution, the said James M. Beck, the trustee who held the title to said land conveyed as aforesaid, conveyed the same to said lumber company, and upon the same day the said company, by its president and secretary, duly authorized by resolution of the board of directors, reconveyed to said Waterman all the lands conveyed by him and to said J. C. Atlee, Samuel Atlee, Charles Brewster, Joseph A. Smith and William H. Kretzinger the lands conveyed by them

to said Kretzinger as aforesaid; and said reconveyances were duly received by the grantees therein and accepted and recorded by them and said lands are now held thereunder.

These defendants, further answering, state that said resolutions were passed and said reconveyances made in pursuance of an agreement between the stockholders in said company, including said Brewster and Smith, by which it was agreed that the lien of the judgment in favor of Milo Smith should be released as to all the land so reconveyed, except those reconveyed to Waterman,
42 and that said judgment should be collected only out of the lands reconveyed to said Waterman, and that all claims for monies advanced by petitioner for Brewster & Smith should be cared for and adjusted by said Brewster & Smith, and when said reconveyances should be made that the affairs of the company should be considered finally settled; that the lien of said judgment in favor of Smith was released as to all the lands except those reconveyed to Waterman, and no claim has ever been asserted thereunder against the other stockholders in said company or the lands reconveyed to them; that said reconveyances were made in full and final settlement of the affairs of said lumber company, and said petitioner equally with Brewster & Smith are now bound by said settlement and equitably estopped from going behind the same or calling the same in question.

Further answering, these defendants deny, on information and belief, that the petitioner ever advanced to the Black River Company the sums and amounts stated in said petition or any amount whatever, or that it is now entitled to recover said sums or any sums, either from the said Waterman, as a stockholder thereof, or the defendants, as his executors.

Further answering, defendants admit that certain proceedings were had in the courts of Wisconsin, which were afterward removed to the circuit court of the United States, substantially as alleged, and that a receiver was appointed therein for all the property and
43 effects of said company, and that said receiver took possession thereof and disposed of all the assets thereof which came to his hands, collected all its available credits, and paid all its debts, excepting such debt, if any, as the said petitioner held against it and the debt due to Milo Smith, but defendants, on information and belief, deny that said debt to Milo Smith has ever been released or in any — discharged, except in the manner hereinbefore stated.

And defendants, further answering, admit that in said litigation the said James S. Waterman was not a party, but that all the other stockholders and the company itself were parties thereto, but defendants deny that the only matter then in issue was the validity of the chattel mortgage described in the petition. On the contrary, defendants aver and will prove that under the direction of the court the receiver appointed as aforesaid disposed of the assets of said company, excepting only the lands, which the stockholders thereof, with the consent of the petitioner herein and said Milo Smith, directed to be reconveyed as aforesaid; that said receiver collected all the credits of said company and paid all its debts, except the two

aforesaid, and that the same was done by and with the express and written consent of the petitioner, but said receiver made no effort to collect any of said supposed indebtedness of said Waterman or of any subscribers to said stock by reason of said subscription, nor did
44 petitioner nor any of the parties owning it as aforesaid ask or demand that he should do so, or apply to the court for an order for that purpose; but, on the contrary, petitioner and the other parties to said suit above named permitted the said assets to be distributed and said trust closed and said receiver discharged and said cause to be finally disposed of by decree without any effort to have such alleged deficient subscriptions collected in said proceeding, whereby, defendants insist, petitioner and all the parties to said proceeding are forever barred from proceeding anew for the collection thereof.

Defendants, further answering, say that as to whether petitioner holds or owns the notes and obligations described in said petition, or any of them, as therein alleged, they are not informed and can neither admit or deny the same, but call for proof thereof; but defendants, on information and belief, deny that any thereof were ever endorsed by any firm of which said Waterman is a member or by any person having power to bind the said Waterman thereby, and aver that if there ever was any such liability created afterward in the lifetime of said Waterman such supposed obligation was, for a valuable consideration, duly released and discharged by petitioner.

Further answering, defendants say that, as they are advised, the said company has not, by virtue of the said provision of the statutes of Wisconsin and the matters in said petition stated, become dissolved, but is still liable to be sued on its obligations and should be a party to any proceeding to wind up its affairs and collect and
45 apply its assets; wherefore defendants, on information and belief, deny the said allegation of said petition.

Defendants admit the death of the said Waterman and their appointment as executors of his last will and testament, but deny all the other allegations of said petition not hereinbefore specifically answered.

And defendants further say that, as they are advised, said petition does not, upon its face, state a sufficient cause of action against them, and pray that upon the hearing hereof they may have the same advantage of this answer as if they had specifically demurred thereto.

And now, having fully answered said petition, defendants pray to be hence dismissed with their costs, &c.

PHILANDER M. ALDEN,
GEORGE S. ROBINSON,
Executors of the Last Will and Testament of James S. Waterman, Deceased.

D. J. CARMS AND
WILSON & MOORE,
Counsel.

Endorsed: Filed May 19, 1886. Wm. H. Bradley, clerk.

46 Afterwards, to wit, on the third day of June, in the adjourned May term of said court, 1887, in the record of the proceedings thereof, in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

BANK OF FORT MADISON
vs.
PHILANDER M. ALDEN *et al.*, Executors, &c. } In Chancery.

Now come the parties, by their solicitors, and this cause being set for hearing this day, now comes on to be heard upon pleadings and proofs, and, after hearing the arguments of counsel in part, it is ordered that further hearing herein be postponed until to-morrow morning.

Afterwards, to wit, on the fourth day of June, in the adjourned May term of said court, 1887, in the record of the proceedings thereof, in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

BANK OF FORT MADISON
vs.
PHILANDER M. ALDEN *et al.*, Executors, &c. } In Chancery.

47 Now again come the parties, by their solicitors, and this cause again comes on to be heard upon pleadings and proofs, and, after hearing the concluding arguments of counsel, the court takes the same under advisement.

48 Afterwards, to wit, on the eighth day of August, in the July term of said court, 1887, in the record and proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Decree.

BANK OF FORT MADISON
vs.
PHILANDER M. ALDEN, *et al.*, Executors, &c. } In Chancery.

The court, having duly considered the evidence and arguments of counsel and being fully advised in the premises, doth find that the equities are with the defendants. It is thereupon ordered, adjudged, and decreed that the bill be dismissed for want of equity and that the defendants recover their costs and charges in this behalf expended; and the complainant now prays an appeal to the Supreme Court of the United States, which is granted upon filing an appeal bond in the penal sum of five hundred dollars, with surety to be approved by the clerk of this court.

Afterwards, to wit, on the first day of September, 1887, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

49 Know all men by these presents that we, the Bank of Fort Madison, a corporation created by and existing under the laws of the State of Iowa, as principal, and Theodore Sheldon, as surety, are held and firmly bound unto Philander M. Alden and George S. Robinson, executors of the estate of James S. Waterman, deceased, in the full and just sum of five hundred dollars, to be paid to the said Philander M. Alden and George S. Robinson, executors as aforesaid, their certain attorney, executors, administrators, or assigns; to which paymen, twell and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this third day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at a term of the circuit court of the United States for the northern district of Illinois, in a suit depending in said court between said Bank of Fort Madison, complainant, and said Alden and Robinson, executors as aforesaid, a certain decree was rendered against the said Bank of Fort Madison dismissing its bill of complaint in said cause for want of equity and at said complainant's costs, and the said Bank of Fort Madison has prayed an appeal therefrom to the Supreme Court of the United States, which said appeal has been allowed upon filing bond for five hundred dollars:

50 Now, the condition of the above obligation is such that if the said Bank of Fort Madison shall prosecute its said appeal to effect and answer all damages and costs if said appeal be dismissed or said decree be affirmed, then the above obligation be void; else to remain in full force and virtue.

BANK OF FORT MADISON, [SEAL.]
THEODORE SHELDON, [SEAL.]
Its Att'y-in-Fact.
THEODORE SHELDON. [SEAL.]

Approved by—

W. Q. GRESHAM, *Circuit Judge.*

Endorsed: Filed Sep. 1, 1887. Wm. H. Bradley, clerk.

51 On the same day, to wit, on the first day of September, 1887, there was filed in said clerk's office the certificate of evidence in said entitled cause, which said certificate of evidence is in the words and figures following, to wit:

Certificate of Evidence.

In the United States Circuit Court, Northern District of Illinois
In Equity.

BANK OF FORT MADISON
v.
PHILANDER M. ALDEN and GEORGE S. ROBINSON, Executors, &c.

Be it remembered that the above-entitled cause having come on for hearing before the Hon. Walter Q. Gresham, judge of said court, upon the 8th day of June, A. D. 1887, the same being one of the days of the December, 1886, term of said court, the complainant to maintain the issues on its part, introduced the following evidence—that is to say:

Stipulation of Facts Involved Entered into by Counsel, with Exhibits A, B, C, and D thereto Attached.

52 The following stipulation as to a portion of the facts involved has been entered into by counsel for all parties:

It is stipulated that the following may be taken as facts and so considered on the hearing hereof:

1st. The map marked "James S. Waterman Lands, Thomas A. Dyson, commissioner," is a correct map of the lands in question.

2d. That the stumpage on all the lands conveyed by Ketcham & Waterman to Joseph R. Beck, trustee, on account of their stock in Black River Lumber Company, at the time of their deed in 1879 conveying the same, was one hundred and seventy-four and one-half million feet.

3d. That at the time the stumpage on the Gile & Withey tract was fifty-six million feet; on the Hyde or Paine tract was seventy and one-half million feet.

53 4th. That the Gile & Withey tract was sold and conveyed by Waterman to Gile & Withey in the summer of 1882, at $1.50 per 1,000 feet on a stumpage then estimated as above at fifty-six million feet; and that the Goodyear tract was sold and conveyed by Waterman to Gardner, Batchelor & Wells in October, 1882, at $1.50 per 1,000 feet, on a stumpage then estimated as above at forty-eight million feet; that the Hyde or Paine tract was sold and conveyed by Waterman to Welcome Hyde in October, 1882, with the stumpage which was then of the same value per 1,000 feet as the Goodyear and Gile and Withey tracts; and that no portion of the purchase-money received by him as aforesaid for said tract of land has ever been applied by said Waterman or his executors upon any indebtedness of said lumber company, except to the extent of the satisfaction of a judgment against said company in favor of Milo Smith in United States circuit court for the northern district of Wisconsin, rendered October 27, 1881, for $31,163.18.

5th. That the value of all said Waterman lands, apart from the value of the stumpage upon the same, did not at any time exceed $5,000.

6th. That all the stockholders in the Black River Lumber Company paid for their subscriptions to the stock of said company only by a conveyance of pine lands to Joseph M. Beck, as trustee, and that the value of the pine lands so conveyed to said Beck, as trustee, for said company by the respective stockholders was proportioned in each case to the amount of stock subscribed by them respectively—that is to say, all the stock was paid for upon the same basis.

7th. That in April, 1882, J. M. Beck conveyed to the Black River Lumber Company all the pine lands so conveyed to him as trustee for said company by the subscribers to the stock of said company on account of their subscriptions to said stock.

8th. That said Black River Lumber Company, in April, 1882, reconveyed to the original stockholders of said company the lands conveyed by them to said Beck, as trustee, on account of their stock (conveying, however, to James S. Waterman all the lands contributed by Ketchum and Waterman by and with the consent of Ketchum, said Ketchum being at the time indebted to said Waterman, and his share of said lands being conveyed to said Waterman as security for such indebtedness), which said conveyance was made in pursuance of the unanimous vote and at the request of all the stockholders of said company, and without any consideration being paid therefor to said company.

9th. That "Exhibit A" attached to this stipulation is a correct copy of the deed from Ketchum to Waterman and wives to
54 J. M. Beck, trustee, by which the pine lands were conveyed to said Beck on account of the subscription of Ketchum and Waterman to the stock of the Black River Lumber Company, except the description of the lands thereby conveyed, which is omitted from said copy.

10th. That on the 26th day of October, 1880, an agreement, signed by all the parties concerned, a copy of which, marked "Exhibit B," is attached to this stipulation, was filed in the suit of Henry Ketchum *et al. v.* The Black River Lumber Company *et al.*, formerly pending in the circuit court of the United States for the western district of Wisconsin, which said stipulation was acted on by said court, and a decree was entered in the terms of said stipulation in the said cause so pending in the said circuit court, which said cause is the same suit that is mentioned in the bill of complaint filed herein. Said last-named decree operated to settle the rights of all the creditors who had filed claims against the lumber company, excepting those of the Bank of Fort Madison and one of Milo Smith. A copy of the bill of complaint in the suit aforesaid is attached to this stipulation and marked "Exhibit C."

11th. A copy of the agreement entered into October 17, 1879, between all the stockholders, preliminary to the formation of the Black River Lumber Company, is attached hereto, marked "Exhibit D."

(Signed) THEODORE SHELDON,
Sol'r for Compl't.
WILSON & MOORE,
Sol'rs for Def'ts.

Exhibit "A."

The deed executed October 17, 1879, by Henry Ketchum and M. A. Ketchum, his wife, and J. S. Waterman and Abbie L. Waterman, his wife, of the first part, to J. M. Beck, trustee, of the second part, after formal recitations and descriptions of the parties, contains the following conditions:

"Witnesseth: That the parties of the first part, for and in consideration of the sum of two hundred and fifty thousand dollars, to them to be paid by the delivery to them of two thousand five hundred shares of the capital stock of the Black River Lumber Company, a corporation organized and existing under the laws of the State of Wisconsin, before the delivery hereof, by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, remise, release, and quitclaim unto the said party of the second part, his heirs and assigns, forever, in trust and as trustee for the said Black River Lumber Company, and by him to be conveyed to the said Black River Lumber Company upon the terms, conditions, contracts, and agreements hereinafter mentioned, the following-described premises and real estate, situate, lying, and being in the counties of Clarke and Jackson, in the State of
55 Wisconsin, which were lately purchased by said Henry Ketchum and James S. Waterman, of the Chicago, St. Paul and Minneapolis Railway Company—that is to say:

(Description of the lands follows:)

"And it is now understood that there is now unpaid purchase-money to become due upon the said lands to the sum and amount of seventy-five thousand dollars, besides accruing interest thereon, and which is and which remains a lien for the purchase-money upon the whole thereof, and which amount the parties of the first part are liable for the payment thereof; and that by a certain contract in writing entered into and executed by and between Charles Brewster, W. H. Kretzinger, Samuel Atlee, J. C. Atlee, Joseph A. Smith, J. S. Waterman, Henry Ketchum, and M. M. Ketchum, by the terms of which the said Henry Ketchum and James S. Waterman were to convey to said party of the second part, as trustee and for the benefit of said 'Black River Lumber Company,' the said Black River Lumber Company to issue to said Henry Ketchum and James S. Waterman, in such proportions as they may designate, two thousand five hundred shares of the capital stock of said corporation, of the sum of one hundred dollars each, in consideration therefor, and to pay the said unpaid purchase-money for said lands according to the terms of said contract, and which contract bears date the seventeenth day of October, 1879, and which is referred to and made a part of the conditions of this deed, and a copy of which is to be delivered to the said party of the second part with this deed; and it is covenanted and agreed and a condition of this trust that as soon as the said purchase-money now remaining unpaid, with the interest and to accrue thereon, shall have been paid, according to the

terms and conditions of said contract or otherwise, and the further condition that the corporation shall pay all the taxes to be assessed on said lands as required by law, then the said party of the second part or the said George W. Cate shall be and become such trustee as aforesaid, at the time required as such trustee forthwith, on demand, thereafter release and convey the lands hereby conveyed to him to the said Black River Lumber Company in fee, absolute, according to the terms and conditions above written and of the said contract aforesaid."

"EXHIBIT B."

It is hereby stipulated and agreed by and between the stockholders and officers of the Black River Lumber Company, the stockholders and officers of the Bank of Fort Madison, Milo Smith, as follows:

First. That the claims of C. H. and R. D. Ketchum against the Black River Lumber Company, which it is agreed amount
56 to $18,000.00, and no more, may be paid by William R. Sill, receiver, out of the cash assets now in his hands as follows—that is to say, one-half in common lumber, at $9.50 per thousand feet, and one-half in cash.

Second. All claims of Ketchum and Waterman, H. Ketchum, M. M. Ketchum, and H. and M. M. Ketchum against said Black River Lumber Company for moneys, supplies, goods furnished, tools, and improvements on the east fork of the Black river and at Tremont are settled and satisfied.

Third. The said receiver may pay all accounts or claims on the paper hereto annexed marked Schedule "A," but the claims of Huiskamp Bros. and G. M. Smith shall be paid out of the first moneys received on a certain contract for the sale of logs made by said receiver with P. S. Davidson.

Fourth. The receiver may settle with C. H. Ketchum or others all claims for the driving logs belonging to said company in main Black river in the months of May and June, 1880, on a basis of $3,200.00 for the whole drive.

Fifth. The receiver may settle the claims of McDonald Bros. against said company or said receiver under two contracts entered into by McDonald Bros. and Black River Lumber Company. The amount supposed to be due to said McDonald Bros. is about $3,000.00. It is also agreed that the claims of said Black River Lumber Company against said Ketchum and Waterman, H. Ketchum, and H. and M. M. Ketchum are also settled and satisfied.

The circuit court of the United States for the western district of Wisconsin is hereby authorized to enter an order in accordance with the above agreement.

57 "EXHIBIT C."

Circuit Court, La Crosse County.

HENRY KETCHUM and MYRON M. KETCHUM

vs.

THE BLACK RIVER LUMBER CO., THE BANK OF FORT MADISON, W. H. Kretzinger, S. Atlee, Charles Brewster, J. C. Atlee, Joseph A. Smith, and Robert R. Hatch.

The complaint of the plaintiffs in the above-entitled action respectfully shows and alleges that heretofore, to wit, on the 7th day of October, 1879, articles of association of the Black River Lumber Company were duly enacted, by which the said Henry Ketchum, Myron M. Ketchum, with one Theodore H. Earle, associated themselves together for the purpose of forming a corporation under the laws of the State of Wisconsin, to be called the Black River Lumber Company, for the transaction of the business of logging and lumbering and manufacturing and dealing in logs, lumber, and timber, and driving, rafting, cribbing, booming, storing, and transporting logs, lumber, and timber on the Mississippi and Black rivers and their tributaries and the waters connected therewith or running into the same and on the banks thereof, and for the purposes of buying, selling, exchanging, and dealing in real estate within the
58 State of Wisconsin; and afterwards, and before the final organization of said company, other parties owning or having an interest in pine timber on the rivers and waters above mentioned were desirous of becoming members of the said corporation, and thereupon, on the 17th day of October, an agreement in writing in the words and figures following was entered into by the plaintiffs herein and the other parties thereto, viz:

Articles of agreement, made and entered into this seventeenth day of October, A. D. 1879, between Charles Brewster, Joseph A. Smith, William H. Kretzinger, Samuel Atlee, and J. C. Atlee, of Fort Madison, Iowa, parties of the first part, and Henry Ketchum, of New London, Wisconsin; M. M. Ketchum, of La Crosse, Wisconsin, and James S. Waterman, of Sycamore, Illinois, of the second part.

Whereas the above parties have mutually agreed to organize a corporation under the laws of the State of Wisconsin, to be designated as the Black River Lumber Company, for the manufacture and sale of timber, logs, and lumber and such other business as may be included in its charter of incorporation:

Now, therefore, said parties of the first part agree to contribute and convey to a trustee or trustees for the benefit of such company, under certain restrictions agreed upon, a tract of pine land containing about thirteen thousand acres, lying in Clarke, Jackson, and Wood counties, in the State of Wisconsin, lately purchased by said parties from Welcome Hyde, and more fully described by deed on

record in such counties, in the State of Wisconsin, for the sum of seventy-five thousand dollars, $75,000.00; and the parties of the second part agree to contribute and convey to a trustee or trustees for the benefit of such company, under certain restrictions agreed upon, the east twenty-five thousand acres of pine lands lately
59 purchased of the Chicago, St. Paul & Minneapolis Railroad Company, being in the counties of Clarke and Jackson, in the State of Wisconsin, and more fully described by deeds on record in said counties, for the sum of $100,000.00.

And whereas there remains unpaid a portion of the purchase-money on each of said tracts:

Now, therefore, it is agreed that said company assume and pay all such deferred payments as they mature, but that parties of the second part are to advance the funds and take up the said purchase-money notes, aggregating $25,000.00, and interest due on said notes and other deferred payments on their purchases on or about December 1st, A. D. 1879, and thereupon the said company shall execute its note or notes for $27,260.42, payable on or before July 1st, 1880, with 8% per annum, and the parties advancing said funds shall have the notes taken up with the security as a lien on the premises until said company's note is paid, and the first funds arising out of the business shall be applied to the payment of the note or notes of said company last aforesaid.

The parties of the first part agree to advance from time to time, as the company may require it, funds in the aggregate amounting to three-quarters of the sum of $27,260.42, at 8% per annum interest, to be used in carrying on the business of this company, and the balance of the funds necessary are to be furnished by the company, except that the parties of the first part agree to advance to said company an amount equal to three-fourths of what said parties of the second part have advanced on logs which are to be gotten out this coming winter; said H. Ketchum, agent of the parties hereto, to make all necessary arrangements and contracts, and do whatever is necessary to be done in furtherance of the business in preparing and furnishing said logs for market, and with power
60 to act until such time as said parties shall complete their organization as corporation aforesaid, which shall be effected by the first Monday in December, A. D. 1879. As to the money to be advanced by the parties of the first part, as aforesaid, the company, on such advancement, shall execute its notes therefor at three or six months, with interest at eight per cent. per annum. In case any party hereto shall pay or take up any portion of the indebtedness for the purchase price of said real estate, such party shall be entitled to the note of said company, with 8% interest per annum, payable from time to time as the business of the company will permit, or within six months from the date, at the option of the payee; and it is further agreed that there shall be no division of the profits among the stockholders of said company until its indebtedness aforesaid shall all be paid. It is further agreed that until said deferred payments for the purchase of said tracts are made that the timber taken from the same shall be, as nearly as practicable, taken

from the tracts respectively conveyed by the parties of the first part and second part, in proportion to their respective values aforesaid; and it is further agreed that any party taking up any of the purchase-money notes aforesaid shall retain the same and the security therefor, which shall have the same operation as a lien as it had in the hands of the prior holder until paid by the company. The stock of said company shall be taken by the parties hereto in the following proportions—that is to say, the parties of the first part are to have and own three-sevenths and the parties of the second part four-sevenths, which said stock is to be paid by them, respectively, in full payment for the aforesaid conveyances by them to such trustee, and each signer hereof shall receive stock in proportion to his undivided interest in said lands.

61 In witness whereof said parties have hereunto signed, sealed, and delivered the foregoing instrument this seventeenth day of October, A. D. 1879.

CHAS. BREWSTER.	[L. S.]
W. H. KRETZINGER.	"
SAMUEL ALLEN.	"
J. C. ALLEN.	"
JOSEPH A. SMITH.	"
J. S. WATERMAN.	"
H. KETCHUM.	"
M. M. KETCHUM.	"

And thereafter, on or about the — day of ——, 1879, the said corporation was duly organized, the plaintiffs in this action and the said J. S. Waterman subscribing for and owning four-sevenths of the stock in said corporation and the parties of the second part subscribing for and owning three-sevenths thereof; that the defendants herein, W. H. Kretzinger, S. Atlee, Charles Brewster, J. C. Atlee, and Joseph A. Smith, *defendants herein*, are the parties of the same names mentioned in said agreement; that at the time said agreement was made these plaintiffs and the said Waterman were the owners of the amount of pine lands and situated as set forth in said agreement, and the said parties of the second part in said agreement were the owners or represented them of the amount of lands set forth in said agreement as being owned by them, and thereafter in accordance therewith said lands were all conveyed to a trustee for the use and benefit of said corporation; that after the organization of said corporation, to wit, on the — day of ——, 1879, the first meeting of the stockholders was held at its office in the city of La Crosse,

62 Wis., and at such meeting the said W. H. Kretzinger was elected president, Henry Ketchum, vice-president; S. Atlee, Charles Brewster, Henry Ketchum, and W. H. Kretzinger, directors, and thereafter George Kretzinger was elected secretary and the said Joseph A. Smith, treasurer, and the said Myron M. Ketchum was elected general manager; that a code of by-laws was adopted for the government of the said corporation, all of which are still in full force, and so much of which as is or are material to this action are hereunto attached and made a part of this complaint and marked

"Exhibit C," by which by-laws it is provided that the office of said corporation shall be held at the city of La Crosse, Wis., the authority of the said corporation to be in a board of directors to be elected by the stockholders and to have entire control of the business of the company; that the board of directors might elect a general manager, who should have the entire control over the management and economy of the business of the company under the by-laws and subject to the board of directors.

And the plaintiffs further show that in pursuance of the said authority the plaintiff, M. M. Ketchum, was elected general manager of said corporation and entered upon the duties of said office and still holds the same.

That since the formation of said corporation the plaintiffs acquired all the interest of the said James S. Waterman in said corporation, and these plaintiffs are, at the time of the commencement of this action, owners in their own right of four-sevenths of the stock of said corporation.

That before the organization of said corporation, but in contemplation thereof, the plaintiffs had made extensive preparations to carry forward vigorously and successfully the business for which said corporation was organized, and after the organization thereof the business was prosecuted through the winter of 1879–'80,
63 under the direction of M. M. Ketchum, general manager, and during that time and prior to the 29th day of March, 1880, the said corporation had, by and through the efforts and good management of these plaintiffs, cut from the lands described in said schedules and delivered in the said Black river and its tributaries or on the banks thereof, so as to be near to the rafting water at La Crosse, the first sufficient water at hand, fifty-two million feet of logs; and thereupon, immediately after the close of the logging season, they made full and complete — and arrangements to run out the logs so cut and delivered as soon as the water would permit.

That prior to the commencement of this action, the water being sufficient for that purpose, the said M. M. Ketchum, as such general manager, had commenced the running of said logs, and for that purpose had employed in behalf of said company a large number of men, all of whom are still engaged in said business in the employment of said company and as essential and necessary to said logs out of said river as the spring water.

That in pursuance of his authority as general manager, and in furtherance of the objects and purposes, of the said company, the said M. M. Ketchum has caused to be sawed and delivered at Eastman several millions feet of lumber and of logs cut from said lands, and made contracts in the name of said company with the Green Bay & Manitoba R. R. Co. for the transportation of six hundred carloads of said lumber, which said contract has been in part performed by said railroad company and was in process of fulfilment at the time of the pretended assignment hereinafter set forth, and the said railroad company will claim a fulfilment thereof by the said Black River Lumber Company or compensation in case of a failure.

64 That said M. M. Ketchum had also, prior to the 29th day of March, 1880, let to responsible third parties, by contract, the rafting and running of all of said logs rafted at La Crosse during the rafting season of 1880, and the parties to whom such contracts so let are now and for several days last past have been in the performance thereof and will insist upon a full performance thereof by the said corporation.

And these plaintiffs allege that all the affairs of the said corporation in the care and management of these plaintiffs, involving the most extensive preparations for winter logging, the providing of men, teams, provisions, and accommodations necessary for its business, have been conducted in a prudent and economical manner, and under such management the business of the corporation — eminently successful, and a large profit will likely be realized therefrom if the same can be retained in the hands of men who, from their experience and knowledge of such business, are capable of managing and controlling the same; and, upon information and belief, the plaintiffs allege that no fault has at any time been found of or complaint made by the defendants or any of them; that the business of the said corporation entrusted to these plaintiffs or either of them had not been prudently and successfully managed, and these plaintiffs supposed, until the happening of the events hereinafter set forth, that such management was entirely satisfactory to the defendants, Kretzinger, Atlee, Brewster, and their codefendants.

The plaintiffs further show and allege that said corporation is not insolvent, but, on the contrary, if the present probable price is realized for its logs on the year's operations, — not less than $100,000.00;

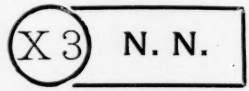
65 that the present stage of water in said stream is sufficient to bring the whole or nearly the whole of said logs into the boom at La Crosse the present spring, when the rafting will go forward with all possible dispatch, and sufficient thereof will be sold in a short time to discharge all the debts of said corporation.

These plaintiffs further show that the defendants, W. H. Kretzinger, S. Atlee and Charles Brewster, J. C. Allen and Joseph H. Smith, reside at Fort Madison, in the State of Iowa, at which place is also located the defendant, The Bank of Fort Madison, and, upon information and belief, the plaintiffs allege that said Kretzinger, Atlee, and Brewster and the said Joseph A. Smith and the said J. C. Atlee are a part or all the owners of said bank, the said Brewster being the president of said bank and Joseph A. Smith cashier thereof.

And these plaintiffs further show that on the 1st day of April, 1880, the foregoing instrument was recorded in the office of the lumber inspector for district No. 2 in the State, at La Crosse, Wis., viz:

Know all men by these presents that the Black River Lumber Company, a corporation — and existing under the laws of the State of Wis., for and in consideration of the sum of $65,000.00 paid and advanced by the Bank of Fort Madison, of the city of Fort Madison, State of Iowa, a corporation organized and existing under the laws of the State of Iowa, and in consideration of the sums advanced and

paid and to be advanced and paid as hereinafter expressed, has granted, bargained, and sold, and by these presents does grant, bargain, and sell, unto the Bank of Fort Madison, its assigns and successors, all the logs cut by the said Black River Lumber Company during the winter of 1879 and 1880 on Black river and tributaries, in the State of Wisconsin, comprising from forty to forty-two mill-
66 ions feet of logs, more or less, of the following marks:



and also all the lumber at Eastmore and all the logs and lumber at Graves' Mill and the Green Bay and Winona R. R., all of said logs and lumber being now in the State of Wisconsin:

To have and to hold all and singular the chattels above bargained and sold or mentioned or intended so to be sold to said Bank *at* Fort Madison, its sucessors and assigns, forever; the said Black River Lumber Company, for itself and its successors, unto the said Bank of Fort Madison, its successors and assigns, the said chattels against all and every persons whomsoever shall and will warrant and forever defend by these presents of all and singular of said logs and lumber. The said Black River Lumber Company has put the said Bank of Fort Madison in full possession: Provided always, That this bill of sale is upon these conditions: If the said Black River Lumber Company shall pay the Bank of Fort Madison the sum of sixty-five thousand dollars heretofore paid and advanced and all further sums which shall be hereafter paid and advanced by the said Bank of Fort Madison to and for said Black River Lumber Company, and shall also pay to the La Crosse National Bank the sum of $10,000.00 and to the Batavia Bank $5,000.00, both of said banks being in La Crosse, Wisconsin, and $5,000.00 to Preston, Kean & Co., of Chicago, Illinois, and all other debts and obligations contracted by the said Black River Lumber Company, then and in that case this bill of sale shall be void; otherwise to be and remain in full force. It is expressly understood that said Bank of Fort Madison shall have the power and authority to sell said logs and lumber and apply the proceeds to the payment of the indebtedness of the Black River Lumber Company above named in the order above specified, and any balance remaining to pay to said Black River Lumber Company.

67 In witness whereof the Black River Lumber Company has executed this bill of sale by its directors, William H. Kretzinger, Samuel Atlee, Charles Brewster, and who have duly signed their names and caused the seal of said corporation to be hereto affixed this 29th day of March, 1880.

BLACK RIVER LUMBER COMPANY.
W. H. KRETZINGER.
S. ATLEE.
CHARLES BREWSTER.

STATE OF IOWA, } ss:
Lee County, }

Be it remembered that on this 29th day of March, 1880, personally appeared before me, William J. Beck, a notary public in and for said county, William H. Kretzinger, Samuel Atlee, Charles Brewster, and H. Kretzinger, directors of the Black River Lumber Company, the signers and sealers of the foregoing instrument in the writing as directors aforesaid, and acknowledged the execution thereof to be the free act and deed of said Black River Lumber Company for the uses and purposes therein mentioned,

——— ———,
Notary Public.

As a large stockholder in the Black River Lumber Company, the above bill of sale is with my approval.

Fort Madison, March 30, 1880.

WELCOME HYDE.

I hereby certify that the foregoing bill of sale was received for record April 1st, 1880, at 11.30 o'clock a. m., and was duly recorded.

ALEX. HYSLOP,
68 *Lumber Inspector Dist. No.* 2, *Wis.*,
Per WEBB.

That at the time of the execution of the said instrument the said Black River Lumber Company was and now is jointly indebted to these plaintiffs in the sum of over $25,000.00 for money by them paid and expended in the said business of said company, for the whole or a part of which plaintiffs have credit on the books of said company, and the same is now due, and that these plaintiffs were not consulted in regard to the making of said transfer and neither of them consented thereto; and under and in virtue of the said assignment or instrument the said defendant, Robert B. Hatch, claims to be entitled to the immediate and exclusive possession for and in behalf of said bank of all the said logs and lumber and to exclude the same corporation therefrom, and has demanded of the said Green Bay & Minnesota R. R. Co. that the said contract for transporting said lumber be transferred to him, the said Hatch, as the agent of said bank, and has in like manner interfered with other contracts made in behalf of the said corporation in regard to said logs before the making of said assignment, and has refused to pay for supplies furnished by said corporation for the running of said logs, and has and is now interfering with and attempting to interfere with the running of said logs by claiming to be the owner thereof in behalf of said bank; that such action and pretenses and claims of the said Hatch is producing uneasiness and apprehensions on the part of those employed by said company and those to whom it is indebted for supplies and labor in cutting, hauling, and running said logs, and these plaintiffs greatly fear that unless the said Hatch and all of said de-

fendants shall be restrained by the injunction order of this
69 court from taking possession of said logs and lumber, or from attempting to do so, or interfering with or molesting the plaintiffs or either of them in the management of the business of said corporation, that serious injury will result in consequence thereof; that said logs must be run now, if at all this season, while the water is at a sufficient stage for that purpose, and therefore the handling and management thereof should remain in the hands of the said corporation, the energy and experience of whose agents will be likely to insure a successful drive; whereas if the possession of said logs should be taken by said Hatch at this particular time, the said Hatch being an entire stranger to the said rivers, the handling of logs thereon, and to the men employed in driving the same, it is more than likely the spring driving of said logs would be more or less a failure, and resulting in damages, not only to the said corporation, but to its creditors, by depriving it of the means to pay them.

And these plaintiffs deny that the said corporation was at the date of the said assignment or instrument indebted to the said defendant bank in the sum of $65,000.00, but they allege that the said parties of the second part in the said last-mentioned assignment, to wit, Charles Brewster, W. H. Kretzinger, Samuel Atlee, J. C. Atlee, and Joseph A. Smith, agreed as in and by said agreement to advance from time to time, as the said company might require it, the sum of $20,438.00, and in addition an amount equal to three-fourths of the amount the said plaintiffs had, prior to the making of said contracts, advanced for supplies, &c., and the said plaintiffs had paid and advanced in regard thereto the sum of $10,000.00, three-fourths of which amounted to $7,500.00, making the aggregate sum to be advanced by said
70 parties $27,938.00, and that amount was so paid and advanced to said company from time to time during the first winter by the parties so agreeing to furnish the same, as set forth in said agreement, but the same was remitted to the said M. M. Ketchum, general manager, by Joseph A. Smith, in the acceptances of said bank, and said parties had credit for the same on the books of said company at La Crosse, and the same constitutes a part of the same sum of $65,000.00 mentioned in the assignment or instrument as being due said bank, but the said company is in nowise indebted to said bank therefor, and is only indebted to said bank in the sum of $30,062.00.

And these plaintiffs further show that as to the sums specified in said agreement or instrument as being due the two banks in La Crosse, the general manager had secured the sum due to the Batavia Bank, and was willing to and would have secured the other if it had been requested, and the said corporation had at all times ample means to secure the said Bank of Fort Madison and all its creditors and retain in its hands sufficient means out of which to make its said debts without embarrassment, and so far as these plaintiffs are concerned they would have been willing the said corporation should have so secured said debts.

But these plaintiffs allege that the property covered by the said

assignment at a fair valuation is worth the sum of $350,000.00, and constitutes all the available means of said company, and said transfer deprives it of the means of paying a single debt. It gives the company the privilege of defeating the sale, but at the same time is particular to give to said bank itself ten times the amount of the actual debt and all the means out of which the company might pay
71 the debt and authorize said bank to offer said logs and lumber for sale immediately in one parcel, thereby preventing competition and enabling said bank to obtain said logs at its own price.

And, upon information and belief, these plaintiffs allege that the said assignment is an attempt to perpetrate a base fraud upon the stockholders of the said corporation to enable the said Fort Madison, defendant, to obtain the — of said logs to stock their own mills at Fort Madison, at a price below the market price; as plaintiffs are informed, said parties or some of them have saw-mills at Fort Madison, for which they have little or no stock.

These plaintiffs further show that the said assignment was not made by the board of directors of said company at any meeting of said board, but was made by the three members signing the said instrument away from the said office of the company and in the State of Iowa.

Upon information and belief, these plaintiffs allege that the said Bank of Fort Madison is inadequate security and irresponsible for the safe keeping of the moneys arising from the sale of all the property conveyed by said assignment.

And these plaintiffs claim that the said assigment is invalid for the following reasons:

1st. Because the said W. H. Kretzinger, S. Atlee, and Charles Brewster had no authority to make the same.

II. Because the same is not in furtherance of the business and objects of the said corporation.

III. Because it takes from the said corporation all its available means and prevents it from transacting the business for which it was organized, and thereby suspends its business.

72 IV. Because, if a mere security, it authorizes a sale by the bank of more of the property than is sufficient to pay the debt.

V. Because the said assignee is not a resident of this State, and because the said assignee gave no bonds or other security for the faithful discharge of the trust.

And the plaintiffs further show and allege that the secretary of the said company is a son of the defendant, W. H. Kretzinger, and is now with the defendant Hatch in charge of the books, office, and papers belonging to said corporation, and appears to be in full accord and sympathy with said Hatch and those represented by him and no longer recognizes the right of said M. M. Ketchum to manage the affairs of said company as general manager thereof, and consequently there is wanting that confidence and friendly feeling necessary to secure the best interest of the company.

That these defendants believe it is the intention of the defendants, Kretzinger, Atlee, and Brewster, and the said stockholders, J. C.

Atlee and Joseph S. Smith, residing at Fort Madison aforesaid, to so manage the affairs of the said corporation as to obtain the control of the logs and lumber cut from the lands aforesaid, and so handle or manufacture the logs into lumber at said Fort Madison, and thereby appropriate to themselves all the benefits expected by these plaintiffs to be realized to the said company and deprive these plaintiffs from all benefit arising from the cutting and marketing of the timber cut from the lands put into said corporation by them; and believing that to be the design and purpose of said Kretzinger, Atlees, Smith, and Brewster, they will take the necessary steps
73 to effect a dissolution of the said corporation at the earliest practicable moment.

These plaintiffs therefore ask the aid and judgment of this court in the premises, and that the said assignment or instrument be declared invalid, and that all the rights, interests, and property of the said corporation be restored to the said corporation, and that pending this action a receiver be appointed to take — of all the logs, timber, and all the property belonging to the said corporation of whatever kind or description, and especially to take full possession and charge of all the logs cut the past winter from the lands aforesaid and all lumber manufactured from said logs and manage and contract and sell and dispose of the same as shall, in his judgment, seem to be for the best interest of all parties interested therein, and in the meantime and until the further order of the court the said defendant, The Bank of Fort Madison, and the defendant, Robert B. Hatch, and each and every of their agents, servants, and employees be restrained from taking possession of said logs, lumber, and other property, and from interfering or molesting the same, selling or offering to sell the same, and interfering with the said corporation or with any person appointed by this court to take charge of the same in the care and management thereof.

And that the plaintiff may have such other and further relief as may be just and equitable.

And the plaintiffs further allege that the said Welcome Hyde, whose name appears to said assignment or instrument as assenting or advising the same, is not and was not at the date of the same a stockholder or the owner of any stock in the said corporation, the said Hyde having, on the 17th day of March, 1880, sold and transferred to the plaintiffs all his, the said Hyde's, interest in the stock of said
74 corporation, and the plaintiffs now hold his written certificate of such sale and transfer, bearing date said 17th day of March, 1880.

G. C. PRENTISS,
Pl't'ffs' Att'y.

STATE OF WISCONSIN, }
County of La Crosse, } *ss:*

Myron M. Ketchum, being first duly sworn, upon his oath says that he is one of the plaintiffs in the within action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true, of his own knowledge, except the matters

therein stated on information and belief, and as to those matters he believes it to be true.

MYRON M. KETCHUM.

Subscribed and sworn to before me this 7th day of April, 1880.

B. E. EDWARDS,
Notary Public, La Crosse Co., Wisconsin.

THE STATE OF WISCONSIN:

In Circuit Court for La Crosse County.

HENRY KETCHUM & MYRON M. KETCHUM

vs.

THE BLACK RIVER LUMBER COMPANY, W. H. KRETZINGER, S. Atlee & Charles Brewster, J. C. Atlee, Joseph A. Smith, The Bank of Fort Madison, & Robert B. Hatch.

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service,
75 and defend the above-entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complainant, a copy of which is herewith served upon you.

G. C. PRENTISS,
Plaintiffs' Attorney.

P. O. address: La Crosse, La Crosse county, Wis.

76 EXHIBIT "D."

Articles of agreement made and entered into this 17th day of October, A. D. 1879, between Charles Brewster, Joseph A. Smith, William A. Kretzinger, Samuel Atlee, and J. C. Atlee, of Fort Madison, Iowa, parties of the first part, and Henry Ketchum, of New London, Wisconsin, M. M. Ketchum, of La Crosse, Wisconsin, and James S. Waterman, of Sycamore, Illinois, parties of the second part.

Whereas the above parties have mutually agreed to organize a corporation under the laws of the State of Wisconsin, to be desigignated as the "Black River Lumber Company," for the manufacture and sale of lumber, logs, and timber, and such other business as may be included in the charter of incorporation:

Now, therefore, said parties of the first part agree to contribute and convey to a trustee or trustees for the benefit of such company, under certain restrictions agreed upon, a tract of pine land containing about thirteen thousand acres lying in Clark, Jackson, and Wood counties, in the State of Wisconsin, lately purchased by said parties from Welcome Hyde, and more fully described by deed on record in said counties, for the sum of $75,000.00, and the said parties of

the second part agree to contribute and convey to a trustee or trustees for the benefit of such company, under certain restrictions agreed upon, the east twenty-five thousand acres of pine lands lately purchased of the Chicago, St. Paul and Minneapolis Railroad Company, being in the counties of Clark and Jackson, in the State of Wisconsin, and more fully described by deeds on record in said counties, for the sum of $100,000.

And whereas there remains unpaid a portion of the purchase-money on each of said tracts:

Now, therefore, it is agreed that said company shall assume and pay all such deferred payments as they mature, but the parties of the second part are to advance the funds and take up the said purchase-money notes, aggregating $25,000, and interest due on said notes and other deferred payments on their purchase on or
77 about December 1, A. D. 1879, and thereupon the said company shall execute its note or notes for $27,260.42, payable on or before July 1, 1880, with eight per cent. per annum interest, and the parties advancing said funds shall hold the notes taken up with the security as a lien on the premises until said company's note is paid, and the first funds arising out of the business after paying of the current expenses of operating the said business shall be applied to the payment of the note or notes of said company last aforesaid. The parties of the first part agree to advance from time to time, as the company may require it, funds in the aggregate amounting to three-quarters of the sum of $27,260.42, at eight per cent. per annum interest, to be used in carrying on the business of the company, and the balance of funds necessary are to be furnished by the company, except that the parties of the first part agree to advance to said company an amount equal to three-fourths of what said parties of the second part have advanced on logs which are to be gotten out this coming winter.

Said Henry Ketchum is hereby appointed and constituted agent of the parties hereto to make all needed arrangements and contracts and do whatever is necessary to be done in furtherance of the business in preparing and furnishing said lots for market, and with power to act until such time as said parties shall complete their organization as corporation aforesaid, which shall be effected by the first Monday in December, A. D. 1879.

As to the moneys to be advanced by the parties of the first part as aforesaid, the company on such advancement shall execute its note or notes therefor at three or six months, with interest at eight per cent. per annum.

In case any party hereto shall pay or take up any portion of the indebtedness for the purchase price of said real estate, such party shall be entitled to the note of said company with 8% per annum interest, payable from time to time as the business of the company will permit, or within six months from its date, at the election of the payee; and it is further agreed that there shall be no division of the profits among the stockholders of such company until its indebtedness aforesaid shall all be paid.

It is further agreed that until said deferred payments for the pur-

chase of said lands are made that the timber taken from the same shall be, as nearly as practicable, taken from the tracts respectively conveyed by the parties of the first and second parts in proportion to their respective values aforesaid.

It is further agreed that any party taking up any of the purchase-money notes aforesaid shall retain the same, and the security therefor, which shall have the same operation as a lien as it had in the hands of prior holder until paid by the company.

The stock of said company shall be taken by the parties
78 hereto in the following proportions—that is to say, the parties of the first part are to have and own three-sevenths and the parties of the second part four-sevenths, which said stock is to be received by them respectively in full payment for the aforesaid conveyances by them to such trustee, and each signer hereof shall receive stock in proportion to his individual interest in said lands.

In witness whereof the said parties have hereunto signed, sealed, and delivered the foregoing instrument this 17th day of October, A. D. 1879.

79 *Depositions of Joseph A. Smith, William A. Sutor, Forrest J. Smith, and E. E. Bentley.*

80 UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of said District. In Equity.

BANK OF FORT MADISON
vs.
PHILANDER M. ALDEN and GEORGE S. ROBINSON, Executors of the Estate of James S. Waterman, Deceased.

The deposition of Joseph A. Smith, a witness produced, sworn, and examined on behalf of the complainant in the above-entitled cause, said deposition being taken by consent before M. L. Raftree, notary public.

Present: For complainant, Mr. Theodore Sheldon; for defendants, Mr. John P. Wilson and Mr. D. J. Carnes.

Direct examination by Mr. SHELDON:

Q. State your name, age, and occupation.

A. Joseph A. Smith; cashier of the Bank of Fort Madison; residence, Fort Madison, Iowa.

Q. Is that the complainant in this case?

A. Yes, sir.

Q. Do you know Philander M. Alden and George S. Robinson, the defendants in this case?

A. No, sir; I never met them until to-day.

Q. Did you know James S. Waterman in his lifetime?

81 A. Yes, sir.

Q. When did you first become acquainted with Mr. Waterman?

A. I think it was in the year 1879.

Q. Do you know, Dr. Smith, where the original is of the agreement entered into on the 17th day of October, 1879, in which Charles Brewster, Joseph A. Smith, William H. Kretzinger, Samuel Atlee, and J. C. Atlee, of Fort Madison, were parties of the first part, and Henry Ketchum and M. M. Ketchum, of Wisconsin, and James S. Waterman, of Sycamore, Illinois, were parties of the second part?

A. My recollection is that Mr. Waterman kept the original and gave us copies.

Q. Is the paper which you now hold in your hand a copy of that agreement?

A. Yes, sir; I think that is a copy of it. I didn't see it when it was written up; it was written up by the lawyer.

(By Mr. SHELDON: The stenographer may note an admission that this is a copy, and it may be treated as the original for the purposes of this suit.)

Q. Was the Black River Lumber Company thereafter incorporated in pursuance of this agreement?

A. Yes, sir; it was.

Q. Who were the stockholders?

A. There was James S. Waterman, Henry Ketchum, M. M. Ketchum—these are the principal ones on that side; then there was John Attlee, Samuel Attlee, W. H. Kretzinger, Charles Brewster, and myself.

Q. Can you state the amounts of stock taken by each person?

81½ A. I have a memorandum of it. (After consulting a memorandum.) J. C. Waterman, 1,250 shares: H. Ketchum, 625 shares; M. M. Ketchum, 625 shares; J. C. Attlee, 468 shares; Samuel Attlee, 469 shares; Charles Brewster, 335 shares; W. H. Kretzinger, 468 shares; Joseph A. Smith, 235 shares; making a total of 4,375 shares.

Q. What is the amount of each share of stock?

A. $100.

Q. Making the total capital of the company how much?

A. $437,500.

Q. Was the stock so subscribed paid for according to the terms of the agreement that you just offered in evidence?

A. It was not.

Q. You don't understand me; that agreement was carried out—these pine lands mentioned in the agreement were, in accordance with the terms of the agreement, contributed by these various parties to make up the company?

A. Yes, sir.

Q. Was any cash put in by any of the stockholders that you have named?

A. None.

Q. Did Mr. Waterman pay any cash in addition to the pine lands he contributed to the company?

A. He did not.

Q. Then the only payments, if I understand you, that Mr.

82 Waterman ever made to this company was the contribution of the pine lands owned by him, as set forth in this agreement?

A. Yes, sir.

Q. Did you know Henry Ketchum?

A. Yes, sir.

Q. Did you know his son, M. M. Ketchum?

A. Yes, sir.

Q. Are they the same persons who you have heretofore testified as holding 365 shares of this stock?

A. Yes, sir.

Q. Is that the same Henry Ketchum who, shortly thereafter, along with James S. Waterman and their respective wives, conveyed this pine land to James M. Beck in accordance with this agreement?

A. They are the same persons.

Q. Now, at the time of entering into this agreement and at the time of the formation of this company, did you, as one of the parties to that agreement, have any conversation with Henry Ketchum and M. M. Ketchum as to the value of the lands proposed to be contributed by Mr. Waterman?

(By Mr. WILSON: Objected to as incompetent, on the ground that the statements of Ketchum were not evidence against Waterman.)

A. I shall have to answer that to the best of my knowledge. The land that we contributed cost us $75,000. It was represented to us that their land, including some 4,000 acres that was never turned over to the Black River Lumber Company, cost them $100,000, and to make it equitable they put in a certain

83 proportion—I think it was 3,500 acres—and they were to receive $\frac{4}{7}$ and us $\frac{3}{7}$, believing that that was an equitable distribution from the value of the lands.

Q. Then, if I understand you, this division, being $\frac{4}{7}$ to Ketchum and Waterman and $\frac{3}{7}$ to the Fort Madison men, was arrived at on the basis of the land contributed by Ketchum and Waterman being worth $100,000, and the land contributed by the Fort Madison men being worth $75,000?

A. That was it exactly.

Q. Was that understanding or not based upon the representations made by the Ketchums as to the value of this land?

A. I cannot say that it was Ketchums' or Waterman's, but it was based on the representations made to us by them.

(By Mr. WILSON: We object to that evidence on the ground that the witness is incompetent to testify.)

Q. In dealing with you who conducted on behalf of Ketchum and Waterman the negotiations?

A. Mr. Ketchum was the principal one—that is, M. Ketchum.

Q. Are you personally familiar with the value of the pine lands mentioned in this agreement?

A. Not personally.

Q. You are not an expert in the value of these pine lands?
A. No, sir.
Q. Although at that time you and Mr. Brewster and Mr. Kretzinger were the owners of a tract similiar to the tract conveyed by Ketchum and Waterman, I believe?
A. Yes, sir.
Q. Was there an incumbrance or incumbrances on these two tracts conveyed to James M. Beck in accordance with the
84 terms of this agreement?
A. There were incumbrances upon both.
Q. How much was there in the way of an incumbrance upon the Waterman tract?
A. $75,000.
Q. Being part of the purchase-money?
A. Yes, sir.
Q. And how much upon your tract?
A. There was one payment—one-fifth of $75,000—$18,750, I think—one-fourth—there was one payment of one-fourth of $75,000, and the balance was still there on it in the way of a mortgage. That was the first payment.
Q. These lands were then conveyed to James N. Beck in accordance with the terms of this contract?
—. ——.
Q. What did James M. Beck, trustee, do with them?
A. What did he do with the title of the land?
Q. He held it, and to whom did he convey it?
A. I don't recollect the exact time that he held it; he held it until it was conveyed back to the parties. The title of the Waterman tract was conveyed to Ketchum and Waterman and the other tract conveyed to the other stockholders. That was in the year 1882.
Q. Neither of these tracts, then, was ever conveyed to the Black River Lumber Company?
A. Neither of them.
Q. Did the Bank of Fort Madison make any advances to the Black River Lumber Company after its formation on the first day of April, in the year following? And, if so, you may state the amount.
85 A. Yes, sir; it did. It was sixty thousand or sixty-five thousand dollars. They advanced sixty-five thousand dollars, and afterward advanced fifteen thousand dollars—that is, other parties advanced it by their endorsement. This that they advanced by other endorsement was paid afterward by the receiver; then, in addition to that, there was ten hundred and eleven dollars and sixty-four cents and thirteen hundred and forty-two dollars and ninety-seven cents, making in all sixty-six thousand three hundred and fifty-four dollars and sixty-one cents.
Q. At whose request were these amounts advanced by the bank?
A. By the stockholders.
Q. Stockholders of what?
A. Well, of both parties.
Q. You mean the stockholders of the Lumber Company?
A. Yes, sir.

Q. Did the president ask for these advances?

A. Yes, sir.

Q. Who was the president?

A. W. H. Kretzinger.

Q. Did the Lumber Company execute any evidence of indebtedness for this indebtedness; gave you notes, or anything?

A. Yes, sir; gave notes for everything.

Q. For each advance that was made the bank took the note of the Lumber Company?

A. Yes, sir. I will state here that after the bank had advanced a certain amount they refused to advance any more, and they
86 gave a chattel mortgage then, and the bank continued to advance the rest.

Q. The Lumber Company gave the bank a chattel mortgage secured by what?

A. A mortgage of the logs they cut.

Q. Well, state what became of that mortgage shortly.

A. That mortgage was signed by all the stockholders except Henry Ketchum; he promised to sign it.

Q. Just state what became of it.

A. The mortgage, after it was recorded, we got into litigation about it, and a receiver was appointed and the bank men gave up the mortgage.

Q. Are these notes which I hand you the evidence of indebtedness given by the Black River Lumber Company to secure these advances?

A. Yes, sir; they are.

Q. Will you please state the amount of each and its date, to whom payable and when payable, in the order in which they are in?

A. The first, marked Exhibit 1, was given November 3rd, '79, for $2,000, payable six months after date; the second, Exhibit Number 2, was given November 12th, '79, for $5,000, due six months after date; the third, Exhibit Number three, was given December 6th '79, due six months after date, for $5,000; the fourth, Exhibit Number 4, was given December 22nd, '79, for $2,000, due six months after date; the fifth was given December 31st, '79, for $5,000, due six months after date; the sixth was given January 12th, 1880, for $2,000, due six months after date; the seventh was given Jan-
87 uary 12th, 1880, for $1,000, due six months after date; the eighth was given January 12th, 1880, for $2,000, due six months after date; the ninth was given January 26th, 1880, for $1,250, due four months after date; the tenth was given January 26th, 1880, for $1,250, due four months after date; the eleventh was given January 26th, 1880, for $25,000, due four months after date; the twelfth was given March 5th, 1880, for $5,000, due four months after date; the thirteenth was given March 5th, 1880, for $2,500, due four months after date; the fourteenth was given March 5th, 1880, $2,500, due four months after date; the fifteenth was given March 22nd, 1880, for $10,000, due three months after date; the sixteenth was given March 31st, 1880, for $10,000, due in ninety days; the seventeenth was given April 8th, 1880, for $5,000, due in

ninety days; the eighteenth was given May 4th, 1860, for $1,011.64, due one day after date; the nineteenth was given June 5th, 1880, for $1,342.97, due one day after date. These two last notes were for supplies that we had to pay for afterwards.

Q. Were these notes actually given for the respective sums duly advanced by the bank to the Lumber Company—do they represent the money actually paid?

A. They represent the money actually paid.

Q. Are these the notes which were the basis of the decree in the Wisconsin suit—the litigation you have mentioned—the copy of which is annexed to the bill in this case?

A. Yes, sir; they are.

Q. You may state the amount of that decree.

A. The amount of the decree is $32,366.13.

Q. What amounts have since been paid to the Bank of Fort Madison upon that decree?

88 A. There was paid in August $400. The assets brought at public sale $125 and the claim of S. & J. C. Attlee, $11,245.61, making in all $11,760.61; but I am under the impression that I received $2,100 in cash, in addition to these amounts, from the receiver.

Q. How much is the balance then left due the bank?

A. $58,505.53.

Q. That is the amount due, then, I understand, on the 4th of January, 1884?

A. I think that this $2,100 was paid after the decree.

Q. The amount, then, you have given of $58,505.53 is the amount now due upon that decree and unpaid?

A. Yes, sir; due and unpaid.

Q. Now, you may state briefly, Dr. Smith, the uses the amounts of that money was put to by the Black River Lumber Company—the amounts of money you testified to have been advanced by the bank.

A. This money was advanced to enable them to get out logs.

Q. Did it actually go into the expense of getting out logs?

A. That was what it was advanced for; and it was reported that they put in 40,000,000 of lumber, and that is what this money went for—to put logs into the river.

Q. That is, the logs upon the land contributed by the various stockholders?

A. But I say that 40,000,000 never came out of the river.

Q. Had the Black River Lumber Company any money on hand with which to get these logs and bring them to the market?

A. Not a dollar.

89 Q. Was money necessary for this purpose?

A. It is absolutely necessary; in the business of the company they could not have done anything without it.

Q. Have the company any other assets whatever except a conditional title to these pine lands?

A. None.

Q. Had it any means except to borrow money on these lands?

A. Nothing at all.

Q. Were the affairs of the Lumber Company wound up by the receiver?

A. Yes, sir.

Q. What proportion of the debts of the company did the receiver pay—are there any other outstanding creditors?

A. He paid all the creditors except the Bank of Fort Madison.

Q. The receiver got in all the assets and paid all the creditors except the bank. Is that the case?

A. Yes, sir.

Q. Mr. Waterman, during all these proceedings, was a resident of the State of Illinois, was he not?

A. Yes, sir.

Q. He lived where?

A. At Sycamore, De Kalb county, Illinois.

Q. Has the Black River Lumber Company quit doing business?

A. It has. I think it was in 1882; the last of the logging was in 1880.

Q. That was the time the receiver took possession?

A. Yes, sir.

Q. They have not done any business then as a corporation,
90 then, since the receiver took possession of the assets?

A. No, sir.

Q. Was the Black River Lumber Company solvent at the time the receiver took possession?

A. No, sir.

Q. Has it ever been since solvent?

A. It never has.

Q. Did the Black River Lumber Company pay these various notes at their maturity?

A. It did not pay any of them.

Q. Are they still unpaid?

A. They are still unpaid.

Q. They were duly presented?

A. Yes; they were duly presented.

Q. Please look at the note I hand you, purporting to be the note of the Black River Lumber Company for $10,000, dated March 22nd, 1882, due in 3 months, with interest at 3 per cent. after maturity, and state what endorsements are on the back thereof.

A. It is endorsed by J. C. Attlee, W. H. Kretzinger, Ketchum & Waterman, and Milton High.

Q. Is there attached to that note what purports to be the notary's protest.

A. Yes, sir.

Q. Has it ever been paid?

A. It has never been paid.

Q. Who composed the firm of Ketchum and Waterman at the time that endorsement was put upon that note?

91 A. Ketchum and Waterman composed the firm. I understood H. Ketchum and James S. Waterman.

Q. What was the business they transacted, do you know?

A. They were in the lumber business—getting out logs.

Q. Were they engaged in that business on the 22nd of March, 1880?

A. Yes, sir; and for a year or two before they went into this company they had been engaged in the lumber business—getting out logs.

Q. Do you know how long after March 22nd, 1880, that partnership lasted?

A. No; I don't.

Q. Who put that endorsement of Ketchum and Waterman on the back of that note?

A. Henry Ketchum.

Q. How did that endorsement happen to come there?

A. We would not loan the money without security, and required them to endorse it.

Q. The bank, you mean, would not advance the money on the note without the security of the endorsement?

A. No, sir.

Q. Were both Henry Ketchum and Henry S. Waterman at the time this endorsement was made stockholders in the Black River Lumber Company?

A. Yes, sir.

Q. Do you know where that note was endorsed by Ketchum and Waterman?

A. In Fort Madison, at the bank.

92 Q. By Mr. Henry Ketchum personally?

A. Yes, sir; by him personally.

Q. Do you know his signature (handing him the note)?

A. Yes, sir; that is his signature.

Q. Is that the firm signature on the back of that note?

Mr. WILSON: We object to that—as to the firm's signature; that is a conclusion.

Q. Is that the signature put there by Mr. Henry Ketchum?

A. It is.

Q. This note was endorsed, then, Ketchum & Waterman at the bank in F'rt Madison, by Henry Ketchum?

A. Yes, sir.

Q. Was that done on the day the note was made?

A. Yes, sir.

Q. And before the cash was advanced by the bank?

A. Yes, sir; before the cash was advanced by the bank.

Q. To whom did the bank pay that cash?

A. Sent it to the Black River Lumber Company, by R. B. Hatch—sent it to La Crosse by him.

Q. Hatch was the man engaged in getting out these logs?

A. Hatch was the man who, when the mortgage was given to the bank, went up in the interest of the bank. He went up at this time with this money to pay off the indebtedness and get out these logs.

Q. With the proceeds of this note?

A. Yes, sir.

Q. Do you know of any other transaction at that time in which Henry Ketchum claimed to represent the firm of Ketchum &
92¼ Waterman—claimed that there was such a firm and acted for it?

By Mr. WILSON: Objected to as incompetent and irrelevant.

A. Yes, sir; they sent logs to Attlee after that firm endorsement was put on the back of the note by Henry Ketchum.

Q. Did you have any talk with Mr. Waterman?

A. About what?

Q. About anything?

A. Yes, sir; we had a good many conversations.

By Mr. WILSON: We object to the witness stating any conversations he had with Mr. Waterman.

Q. Do you know of your own knowledge now that Mr. Waterman knew that this endorsement had been put upon this note?

A. Yes, sir.

Q. About how long after?

A. I cannot state the time.

Q. Within a few months?

A. I cannot state the time—about how soon after, I cannot recollect.

Q. Was Mr. Waterman frequently in that part of the country?

A. Not often; he was there just occasionally.

Q. Did the Bank of Fort Madison ever have any cause or act or reason to believe that Ketchum was acting without authority in signing the firm name of Ketchum & Waterman in the endorsement of this note?

By Mr. WILSON: Objected to as calling for the conclusion of the witness and on the ground that the question is leading and that the witness is incompetent to testify as to transactions or conversations with Waterman either as to what was said or as to his conclusions therefrom.

92½ A. We had none; and I am confident that when he signed that note he had authority to sign the firm name.

By Mr. WILSON: Objected to in so far as it relates to conversations with Ketchum as incompetent and not responsive to the question, and that the statements by Ketchum were not binding upon Waterman.

Q. How long previous to the execution of this note did you know Ketchum to have been representing that there was such a firm as Ketchum and Waterman, composed of himself and James S. Waterman?

A. Well, it was prior to November 3rd, 1879, when this company was formed.

Q. Six or seven months?

A. Yes, sir; I will say here that there was a boom company that

they went into, and Ketchum and Waterman were largely interested in that. At one time, on November 3rd, they formed a booming transportation company and this company bought stock of Ketchum and Waterman—they had 3,076 of it—Ketchum and Waterman had.

By Mr. WILSON: Objection taken to the witness stating what Ketchum and Waterman represented on the ground that the witness is incompetent, by reason of interest, from testifying as to any representations made by Waterman, and that the representations of Ketchum are incompetent as against Waterman's estate.

Q. Now, Doctor, about how many times in the matter of this Black River Lumber Company did Mr. James Waterman come up to Fort Madison to look after these matters?

A. Well, he had his brother there a good portion of the
92¾ time looking after his interest up in the woods, and he made his appearance very seldom.

Q. Well, how often?

A. I cannot say.

Q. Did he come up there more than once—up to La Crosse or to the bank at Fort Madison?

A. No, sir; he could not live up there, they were getting out attachments and catching Waterman, and before they went into this his brother was there a good share of the time.

Q. What was his name, do you remember?

A. No, sir; I do not.

Q. Was his brother up in Henry Ketchum's office?

A. I don't know—his brother was in the woods a good deal looking after these interests.

Q. Did you ever go to La Crosse to look after these matters?

A. Yes, sir.

Q. Did you ever see a sign there marked "Ketchum & Waterman?"

A. I cannot answer that.

Q. Where did Mr. Henry Ketchum have his office?

A. They did not have any office after this company was formed.

Q. They took the old office of Ketchum & Waterman?

A. I think they did.

Q. Did Henry Ketchum ever give you, as representing the bank, any information about the character of this partnership?

By Mr. WILSON: Objected to as incompetent.

Q. Whether it was limited or otherwise?

A. I don't think he did.

93 Q. Don't you know whether he did or not?

A. I don't recollect.

Q. Would you have remembered if he had told you that there was a limited partnership?

By Mr. WILSON: Objected to as leading.

A. I cannot say that I would.

Q. You mean to say that if Mr. Henry Ketchum had told you that Mr. Waterman was a limited partner and only liable for a part of the firm debt that you would not have remembered?

By Mr. WILSON: Objected to as leading.

A. I cannot say that I would, but my recollection is none of the best; I cannot say that I recollect of his ever saying that it was, but it was believed by all of us down there that they were in partnership—by all the stockholders.

Q. Was that the general understanding among all the business men in La Crosse?

By Mr. WILSON: Objected to as leading and as immaterial and calling for the conclusion of the witness.

A. I believe it was. Of all that I ever heard speak of it that there was a firm of Ketchum and Waterman.

Q. Has the Bank of Fort Madison any other claim against the estate of James Waterman than the one you have stated?

A. That is all.

Q. Doctor Smith, in this agreement, this preliminary agreement entered into immediately before the incorporation of the company, it is stated that certain lands were to be contributed by the various persons to the agreement, and that the stock of the new cor-
94 poration should be divided into sevenths, four of which Ketchum and Waterman should have, and three of which the parties living in Fort Madison should have. Now, was there any further agreement, written or otherwise, about that stock and its payment by these lands?

A. That contract specified that the first money that was to be paid was for current expenses, and it was on that that we advanced this money. These notes were not to be paid until the money for current expenses had been paid.

By Mr. WILSON: Objected to as giving parol evidence of any other written agreement and as to the competency of the witness to testify to any verbal agreement entered into by Waterman.

A. I do not recollect any other agreement.

Q. Was there ever any agreement, written or otherwise, among these stockholders that the pine lands should be taken in full payment of this stock and that there should never be any assessment on the stock?

By Mr. WILSON: Objected to as leading.

A. There was nothing of the kind.

Cross-examination by Mr. JOHN P. WILSON:

Q. Did you ever receive any certificate of stock in this Lumber Company?

A. Yes, sir.

Q. Have you still got that certificate?

A. Yes, sir.

95 Q. Will you produce it and attach it to your deposition?
A. I will.
Q. Did you ever see the certificate issued to any other party besides yourself?
A. I don't remember.
Q. Do you know whether they were all of substantially the same form as yours?
A. I think they were all the same.
Q. Did you ever object to the form of these certificates?
A. I never did.
Q. How long have you resided at Fort Madison?
A. Since 1868.
Q. Where does Charles Brewster live?
A. In Fort Madison.
Q. How long has he lived there?
A. He has lived there perhaps 40 years; he is one of the old residents.
Q. Where do J. S. and Samuel Attlee live?
A. In Fort Madison.
Q. How long have they lived there?
A. Samuel Attlee was born there.
Q. Where does William H. Kretzinger live?
A. He lives there.
Q. How long has he lived there?
A. Eight or ten years.
Q. Prior to the formation of the Black River Lumber Company were you and Brewster and the two Attlees and Kretzinger
95½ jointly interested in pine lands in Wisconsin?
A. Yes, sir.
Q. How long have you been jointly interested in pine lands?
A. A very short time. We had lately purchased.
Q. Was your joint interest in the lands conveyed to Beck, as trustee?
A. Yes, sir.
Q. Was the bank at Fort Madison organized at that time and doing business?
A. Yes, sir.
Q. Was it a stock company?
A. The Bank of Fort Madison belonged to Mr. Brewster and myself, equally.
Q. Are there any certificates of stock issued by that bank?
A. No, sir.
Q. What is its capital stock?
A. $50,000.
Q. Does it exist under a private charter?
A. It is incorporated under the laws of the State.
Q. Public or private?
A. Public.
Q. When was it organized?
A. In the first place it was a national bank; then it was turned

into a State bank and purchased by a Mr. Cattemore, and about eight years ago we purchased it.

Q. Purchased the stock of the bank?

A. Purchased the whole bank. I never saw a certificate
96 of the stock of this bank.

Q. Was it a bank doing business at the time you and Mr. Brewster became its proprietors?

A. Yes, sir.

Q. You and Mr. Brewster have continued to own that bank from that time to the present?

A. Yes, sir.

Q. Were you and Mr. Brewster proprietors before you purchased the bank?

A. No, sir.

Q. Do you know of a bill in chancery being filed in the circuit court of the United States for the northern district of Illinois by yourself and Charles Brewster, J. C. Attlee, Samuel Attlee, and William H. Kretzinger against Philander M. Alden and Charles S. Robinson, as executors of the estate of James S. Waterman?

A. Yes, sir.

Q. You know of such a suit being filed?

A. Yes, sir.

Q. A bill filed asking that the estate of Mr. Waterman should be required to contribute towards this indebtedness on the basis in proportion of the stock held?

A. Yes, sir.

Q. You knew of that bill being filed—did you furnish any of the information upon which that bill was filed?

A. I think I did.

Q. To whom?

97 A. To Mr. Sheldon.

Q. To Mr. Sheldon—you had interviews with him before that bill was filed?

A. Yes, sir.

Q. Did you state to him the facts connected with the advancing of this money to the Black River Lumber Company?

A. I don't recollect; I suppose I did, though.

Q. Now, in that bill it was alleged that your orators—that is, the gentleman whom I have named to you, at the request of the said Lumber Company, and from time to time between the said dates, in order to pay off the said indebtedness of the company, advanced and loaned to the said company various sums, amounting in all to the sum of $72,336.74, all of which was advanced by your orators at the said company's request. Is that statement in the bill true—that this money, $72,336.14, was advanced by Joseph A. Smith, Charles Brewster, J. C. Attlee, Samuel Attlee, and William H. Kretzinger?

A. Yes, sir.

Q. It is true?

A. Yes, sir.

Q. Is that the same money about which you have testified to as being advanced to the company?

A. Yes, sir.

Q. Have you the deed by which the pine lands were reconveyed to yourself, Smith, the Attlees, and Kretzinger?

A. I think I have.

98 Q. If you have that deed will you produce it, or a copy of it, and attach it to your deposition? Will you also examine and see whether you have a deed from the Black River Lumber Company for the same lands?

A. I will.

Q. Did you or your associates, Brewster, the Attlees, or Kretzinger, give any consideration to the company for the reconveyance to you of these pine lands?

A. No, sir.

Q. Did either of you ever pay anything on account of your stock to the company or any one else except the making of the conveyance of the pine lands to Beck, as trustee?

A. No.

Q. I understand your testimony to be, so far as your knowledge goes, the firm of Ketchum and Waterman had no office after the formation of the Black River Lumber Company; is that correct?

A. I don't know whether they did or not. I know I don't know of their having a separate office.

Q. Outside of the signature by Ketchum of the firm name on the back of the note in evidence, did you, of your own knowledge, know of a single business transaction by the firm of Ketchum and Waterman, as a firm, after the formation of the Black River Lumber Company?

A. Yes, sir.

Q. I am not asking anything from hearsay.

A. Of my own knowledge—it is in this booming transpor-

99 tation company.

Q. You were present?

A. I was present and bought some stock of them and paid them the money for it.

Q. Who did you pay the money to?

A. I believe to M. M. Ketchum.

Q. Paid it to Ketchum?

A. Yes, sir.

Q. What was the date?

A. November 15th, 1879. I will explain. When this Black River Lumber Company was formed they had what was called a booming transportation company; that was the outlet of its logs; they had property there; they owned the principal part of the stock.

By Mr. WILSON: Now I object to the witness testifying on the ground that it would not be competent.

The WITNESS: I merely stated to you that these 309 shares of stock went to Mr. Waterman.

By Mr. WILSON: I did not ask you that; I merely asked you what dealings you had with the firm as a firm.

A. This transaction.

Q. And that transaction you had with Ketchum?
A. Yes, sir.
Q. And your knowledge that it was a firm transaction comes from your conversation with Ketchum and from that alone?
A. Yes, sir; but Mr. Waterman was present when we finally disposed of this stock.
99½ Q. Disposed of what stock?
A. The booming transportation stock; he was present then.
Q. When you disposed of it?
A. No; when Ketchum and Waterman had given their notes for this stock.

By Mr. WILSON: I object to the witness testifying to the contents of any written instrument.

A. I was going to tell you he was to take up one note and we were to take up the other; that arrangement I had with Waterman.
Q. That had nothing to do with the stock of the Black River Lumber Company?
A. Well, they were very intimate. A good deal of the money that was advanced to the Black River Lumber Company went to the improvement of the transportation company.
Q. Well, the booming transportation company was a corporation and the stock of that was not owned by the Black River Lumber Company?
A. Yes, sir.
Q. You swear to its being owned by the stockholders, but not by the company as a company. You say a large portion of the money that was advanced was used for the improvement of the booming company?
A. Yes, sir.
Q. Upon property owned by it?
A. Well, it was owned by the stockholders.
Q. But you state a portion of the money advanced to the
100 Black River Lumber Company was used by the booming transportation company?
A. All the logs that came down the Black river would go down a canal out to the Mississippi river, but when the logs of the Black River Lumber Company would come down they had twenty or thirty men stationed there to turn the logs into the boom.
Q. Then it was not used by the booming company at all?
A. There was no other company to use it but the Black River Company.
Q. Now, was any of this money used for the purposes of the booming company?
A. Well, I simply explained how it was used.
Q. I simply want to know the fact whether any of this money was used for the booming transportation company—I mean used for its benefit in any way?
A. I suppose these men were employed by the booming transportation company to turn these logs into the boom.
Q. Well, these men that were employed by the booming trans-

portation company were paid by this money; is that what you mean?

A. I think they were paid like any other hands.

Q. That is, the hands of the booming transportation company were paid out of this money?

A. Well, the logs had to be rafted.

Q. Do I understand you now that this money was simply used by the Black River Company for paying its own men?

A. I cannot tell you anything more than I have told you about this.

101 Q. Well, were any men of the booming transportation company paid out of this money?

A. No, sir.

Q. Were any of the debts of the booming transportation company paid out of this money?

A. Yes, sir; debts that they made in getting out these logs.

Q. Were any of the debts of the booming transportation company paid out of this money?

A. I don't know.

Q. Then you don't know whether any of this money was used for any other purpose than by the Black River Company to pay its own debts and its own men?

A. That was what it was advanced for.

Q. You don't know what it was used for, then?

A. No; only the agent that we sent there reported that it was used for that purpose.

Q. Do you know what was done with the previous advances?

A. No, sir; I suppose they furnished vouchers and bills.

Q. You don't know what it did go for?

A. No, sir.

Q. Do you know about the deeds being made to the respective parties conveying back these pine lands at the time they were made?

A. Yes, sir.

Q. Did Mr. Brewster know of it?

A. Yes, sir.

Q. Did Mr. Attlee know of it?

A. Yes, sir.

102 Q. Did Mr. Kretzinger?

A. Yes, sir.

Q. Were these deeds made after consultations between the parties?

A. Yes, sir; Mr. Waterman was there when that was done. He was the one that urged it to be done.

By Mr. WILSON: I object to the witness testifying in this manner. I simply ask if it was done upon consultation, and I object to anything further than an answer to the question.

Q. Were you an officer of the Black River Lumber Company?

A. Yes, sir.

Q. What office did you hold?

A. Treasurer.

Q. During what period?

A. During the time these notes were made.

Q. During the entire existence of the company, until it went into the hands of the receiver?

A. No, sir; they had another treasurer afterwards.

Q. After what date?

A. I don't recollect the date.

Q. Some time after the receiver was appointed?

A. Yes, sir; I was treasurer up to the time a receiver was appointed—I was treasurer during all the time all these notes were given.

Q. Who was president?

A. W. H. Kretzinger.

Q. How far is Fort Madison from La Crosse?

103 A. Several hundred miles.

Q. Did either you or Kretzinger, the president, spend any considerable time at La Crosse in the management of the affairs of the company in Wisconsin?

A. No, sir.

Q. At any time?

A. No, sir.

Q. These notes were made and discounted at Fort Madison, Iowa, were they not?

A. Yes, sir; all except these two little ones—these two smaller ones were not discounted; they were for supplies we had to pay for afterwards.

Q. Was any discount charged on these notes or was the full amount of the face of them paid over?

A. They were discounted.

Q. The interest was taken out for the time they were to run?

A. They were not discounted—most of them. I cannot tell without looking at the bank books; none of them were discounted, but were paid in full.

Q. The note dated March 5th, 1880, for $2,500, payable four months after date to the order of W. H. Kretzinger, and by him endorsed; do you know to whom the money was paid on that note and when?

A. Yes, sir; it was sent to La Crosse.

Q. By whom?

A. By me.

Q. To whom at La Crosse?

104 A. To the superintendent there—Ketchum.

Q. Which Ketchum?

A. M. M. Ketchum.

Q. Do you know the amount that you sent?

A. (Witness consulting book.) I sent $10,000.

Q. By what are you refreshing your memory?

A. By the memorandum that was made at the time.

Q. Is that not simply the bill book of the Black River Lumber Company?

A. Yes, sir.

Q. Does it state the amount of the cash sent to La Crosse?
A. Yes, sir.
Q. Is it not true that what it gives is simply the face of the note?
A. No, sir; it says, Sent to La Crosse.
Q. Yes, but it does not state the amount of the cash sent?
A. No, sir.
Q. Will you produce a copy of all the entries on the books of your bank in regard to the indebtedness about which you have been testifying and attach it as an exhibit to your deposition?
A. Yes, sir.
Q. Do you know whether a judgment was recovered against the Black River Lumber Company in the name of Milo Smith?
A. I believe a judgment was obtained; yes, sir.
Q. Do you know the amount of that judgment?
A. I don't know the amount of it, but I know that he with-
105 drew that judgment afterwards and gave the Bank of Fort Madison preference.
Q. Preference on what?
A. On the claim he sued upon.
Q. Do you testify he gave it a preference, so far as the lands held by Judge Beck as trustee are concerned?
A. My understanding is that he gave it a preference on everything.
Q. Do you swear to that; is your memory good?
A. No, sir; my memory is not good.
Q. Do you not know that the lien of that judgment was released as to the lands conveyed to you, Brewster, the Attlees, and Kretzinger, but not as to the lands conveyed to Waterman?
A. No, sir; I don't know that.
Q. Do not you know that it was released as to the lands conveyed to you?
A. No, sir; my recollection is that it was released as to all.
Q. Well, if it was not released as to all your memory would be at fault?
A. Yes, sir.
Q. He was not paid the amount of his judgment either by the company or any one else, so far as you are concerned?
A. I do not know.
Q. Your idea was that he owned that judgment for Mr. Waterman?
A. No, sir; my idea was that that judgment, although in
106 his name, was owned by Mr. Waterman.
Q. But it was not paid, so far as you know?
A. My understanding was that it was released.
Q. Without being paid?
A. I have forgotten now what the claim was he sued upon.
Q. Forgotten what the judgment was rendered for, you mean?
A. Yes, sir.
Q. Well, whatever it was, if it was paid you would know how it was paid?
A. I don't think it was ever paid; I think he released it entirely—withdrew it.

Q. For what consideration did you understand him to release it?
A. Well, nothing but Mr. Waterman getting the land back.
Q. That was your understanding?
A. I think it was so. Well, now when I come to recollect, I think his claim was for the purchase-money mortgage on that land.
Q. Which was assumed by the company?
A. It was assumed by the company, and on the settlement the land reverted back to Mr. Waterman, and I suppose he paid it. Milo Smith testified that he never paid it.
Q. Well, you need not testify to what Milo Smith testified to. To that final settlement both Milo Smith and yourself were parties?
A. There was no settlement except reconveying the land.
Q. You say the judgment was got rid of?

A. I don't know anything about the judgment; my recol-
107 lection is they released the judgment.

Redirect examination by Mr. SHELDON:

Q. Dr. Smith, you stated in the first part of the cross-examination about the statements made in the bill for contribution brought by the Fort Madison men—you stated that the advances were made by the Fort Madison men. Did you mean that they were made by the Fort Madison men individually to the Black River Lumber Company or that they were made through the bank?
A. They were made through the bank to the Black River Lumber Company.
Q. Did the bank make them at the request of these individual stockholders living at Fort Madison?
A. Yes, sir.
Q. Did the notes taken therefore run to the bank?
A. All of them.
Q. Is Henry Ketchum solvent?
A. I cannot answer that question.
Q. So far as you know, is he solvent or insolvent, Doctor?

By Mr. WILSON: Objected to, the witness having stated that he did not know.

Q. Well, can you collect anything out of him?
A. Well, I have made inquiries as to his solvency.
Q. With what result?
A. I cannot find out much about it.
Q. You mean that you cannot find anything upon which you can levy?

By Mr. WILSON: Objected to as leading.

108 A. I cannot find out anything about his financial condition, but it is told me that you cannot collect anything out of him.
Q. That he is execution-proof, you mean?

By Mr. WILSON: Objected to as leading.

Q. When were these inquiries instituted by you?

A. Well, not very long ago.

Q. Do you know any outstanding judgments against Ketchum that are unpaid?

A. Yes, sir.

Q. Do you know any efforts that are being made to collect them?

A. A party asked me if I could give him any information how he could collect them.

Q. That party was trying to collect a judgment against Henry Ketchum?

A. Yes, sir; an attorney that was holding a claim against him.

Q. Did Ketchum make any representations at the time of the formation of this company that led you to think he was a man of wealth?

A. Yes, sir; we understood at that time that he was a very wealthy man. People at La Crosse have told us that if we had made any inquiries there we would never have gone into the company.

By consent of parties, signature waived.

It is agreed that either side shall have the right to recall Dr. Smith.

109 APRIL 18, 1887—11 o'clock a. m.

By agreement, parties met at the office of J. P. Wilson, Esq.

Present: D. J. Carnes and J. P. Wilson, solicitors for defendant, and Theodore Sheldon, Esq., solicitor for complainant.

JOSEPH A. SMITH was recalled for further cross-examination by the defendant and testified as follows:

Q. Mr. Smith, do you remember a meeting of the stockholders in the Black River Lumber Company where the subject of having a reconveyance of the lands held by Beck, as trustee, was discussed?

A. Yes, sir.

Q. Where was that meeting held?

A. Well, it was held part of the time in Judge Beck's office and part of the time in the bank, I think.

Q. At Fort Madison, in Iowa?

A. At Fort Madison, in Iowa.

Q. Who were present at either place when the subject was discussed?

A. Mr. Atlee was present—John Atlee; Mr. Waterman was present, Mr. Kretzinger, Mr. Brewster, I think, and myself, and Milo Smith was there.

Q. Was there an agreement arrived at between the stockholders in regard to such reconveyance?

A. Yes, sir—that is, to reconvey the land.

Q. In the course of that discussion was there anything said in regard to a judgment recovered by Milo Smith against the
110 Black River Lumber Company?

A. I think not.

Q. Was there anything said about getting a release of the lien of that judgment, the lands to be reconveyed to you?

A. My understanding was——
Q. Well, was there anything said?
A. No; I think not; not that I recollect of.
Q. You knew there was such a judgment, did you not?
A. Yes; I knew there was a judgment of that kind.
Q. You knew it was against the Black River Lumber Company?
A. Yes, sir.
Q. Then your recollection is that no provision was made for getting your land released from the lien of that judgment?
A. My recollection is that it was a settlement of all claims when he deed- the land back. It made a complete settlement between them.
Q. Of everything between them?
A. Yes, sir—that is, as far as any claims were concerned, of the land.
Q. You understood that when the land would be reconveyed you would get a good title to your land?
A. Yes, sir.
Q. And you did not expect that that judgment would be enforced against your land?
A. No, sir.
Q. Did you understand that there was any other unsettled matters between you and the parties when that was carried out?
A. Nothing but what was settled at that time. There was an unsettled matter in reference to the boom company that Mr. Ketchum assumed to pay, one note of several thousand dollars, and
111 Mr. Atlee and I agreed to pay the balance; there were two notes of $3,333 each that we agreed to pay.
Q. Was there anything said in regard to the endorsement of Ketchum and Waterman on the $10,000 note, which is in evidence in this case?
A. I think not, sir.
Q. You don't remember anything being said about that?
A. No, sir.
Q. Is your recollection distinct in regard to that?
A. I think it is.

Redirect examination by Mr. SHELDON:

Q. You have stated, Dr. Smith, that at this meeting of the stockholders of the Black River Lumber Company it was decided that there should be a reconveyance of the lands to the respective stockholders, and that that should be a full settlement of all the claims of the company.
A. That is the way I understand it, sir.
Q. Was there or was there not any reference then had to the claim of the Fort Madison Bank, then pending in the circuit court of the United States for the western district of Wisconsin?
A. I don't recollect anything except what Mr. Milo Smith stated, that there was money enough in the hands of the receiver to pay for all claims.

Q. There was no release at that stockholders' meeting of the claim of the bank in any way, was there?

A. No, sir.

112 Q. Was there any discussion about the nature of the claim of the bank?

A. I don't recollect of any.

Q. Do you remember anything being stated at that meeting whereby it was resolved that the lands contributed by H. Ketchum should be reconveyed to Mr. James S. Waterman instead of to Ketchum?

A. The lands that were conveyed to the Black River Company were to be reconveyed to James Waterman; that is my understanding.

Q. Did the Bank of Fort Madison have any hand in that settlement?

A. No, sir; not the bank.

Q. Was there any demand made upon the bank at that time by any of these stockholders that the bank should ratify that settlement and release its claim?

A. No, sir.

Q. Has the bank ever released its claim in any way?

A. No, sir.

Q. Was it a part of that settlement, whereby these lands were reconveyed, that the bank should release its claim?

A. No, sir.

Q. Was there any talk upon that subject?

A. There was no talk on that subject, to my recollection now.

Q. The bank had been at that time about two years prosecuting its claim in the Federal court in Wisconsin, had it not?

A. I don't recollect the time, but I think it was that long.

Q. And it was then undetermined?

A. It was then undetermined.

Q. Do you know whether Henry Ketchum is still living?

113 A. I understand he is dead.

Q. Recently?

A. Perhaps two weeks ago; perhaps longer—within a month.

Q. In what State was he residing at the time of his death?

A. In Wisconsin. I understood so by a letter that his son wrote to a party in Fort Madison.

Q. He had been for many years a resident of Wisconsin, prior to his death, had he not?

A. That was my understanding.

Q. Of what State is his son, M. M. Ketchum, a resident?

A. I understand he is living in Minnesota.

Q. Before that he was a resident of what State?

A. Of Wisconsin.

Q. In what State were those two Ketchums residing at the time of the formation of the Black River Lumber Company?

A. Wisconsin.

Q. On your cross-examination Mr. Wilson asked you if you could remember any instances of dealing with the firm of Ketchum &

Waterman, except their endorsement upon one of the notes before introduced into evidence, and you recollected the transaction in the handling or selling of stock in the boom company. I will now ask you whether you now remember any other transaction in which the Bank of Fort Madison had any dealing with the firm of Ketchum & Waterman?

A. Yes, sir; he borrowed money of the Bank of Fort Madison, and gave a note of Ketchum & Waterman for a time draft. I don't recollect the time now. It was paid at maturity.

114 Q. Who did this?

A. Henry Ketchum.

Q. Do you remember about when?

A. No, I don't remember the time; it is on the bank book.

Q. Was it after the formation of the Lumber Company?

A. Yes, sir. He wanted to borrow more money, but I didn't loan him any more.

Q. How large was the sum?

A. My recollection is it was $2,000.

Q. Whose note did you say Mr. Henry Ketchum executed as security for that loan?

A. Ketchum & Waterman's.

Q. The note was paid at maturity?

A. Yes, sir.

Recross-examination by Mr. WILSON:

Q. You say Mr. Ketchum borrowed the money?

A. Yes, sir.

Q. And the note he gave for the money was signed in the firm name?

A. Yes, sir.

Q. When it was due he paid the note?

A. When it was due he paid the note.

Q. Have you any independent recollection aside from your books of that fact?

A. Yes, sir; not only myself, but I examined the book, and also the assistant cashier, and he recollected it distinctly.

Signature waived.

115 Circuit Court of the United States, Northern District of Illinois. In Equity.

BANK OF FORT MADISON *against* PHILANDER M. ALDEN *et al.*

Depositions of William A. Sutor, Forrest J. Smith, and E. E. Bentley, taken in the city of La Crosse, Wisconsin, on the 3d day of August, A. D. 1886, by agreement, before A. Harrison, commissioner, by written stipulation, formal notice being waived and there being present for the complainants Theodore Sheldon, Esq., and D. E. Carnes, Esq., for the defendants.

Plaintiffs' solicitor offers notice, with service admitted, which is

hereby made a part of these depositions, and, solicitors for defendants not offering the partnership articles or the books of account named therein, the testimony of the witnesses proceeded as follows:

116 WILLIAM A. SUTOR, a witness called on behalf of the plaintiff herein, a resident at La Crosse, Wisconsin, more than 100 miles from the place where this case is to be tried, being duly cautioned and sworn to tell the whole truth and being carefully examined, deposes and says as follows:

Examined by Mr. SHELDON:

Q. Give us your name, business, and place of residence.

A. William A. Sutor; book-keeper for MacDonald Bros.; La Crosse, Wisconsin.

Q. Did you know James S. Waterman in his lifetime?

A. I did.

Q. How long had you known him before his death?

A. My first acquaintance with him, I think, was in 1879.

Q. Do you remember about when he died?

A. No; I haven't any distinct recollection.

Q. Did you know the firm of Ketchum and Waterman?

A. Yes.

Q. What business were they engaged in?

A. In the logging business and lumber generally.

Q. Their headquarters were where?

A. At La Crosse, Wisconsin.

Q. Were you in the employ of that firm at any time?

A. I was.

Q. Between what time?

A. During 1879 and 1880; part of both years.

Q. About when was the firm formed?

A. I think it was formed in the fall of 1878.

117 Q. Who composed the firm of Ketchum & Waterman?

A. Henry Ketchum, James S. Waterman, and M. M. Ketchum.

Q. Is that the James S. Waterman who lived in Sycamore, De Kalb county, Illinois?

A. It is.

Q. And the same Waterman whose executors are defendants in this case?

A. I presume so; I don't know who the defendants are. It is the James S. Waterman of Sycamore, anyway.

Q. When did you say you were first employed by the firm?

A. In May of 1879.

Q. In what capacity?

A. Book-keeper.

Q. And you continued to act as book-keeper for the firm of Ketchum & Waterman up to what time?

A. I was with them for a year, although during the latter part of the year I was with them it was principally settling up the old matters, as the firm were not doing any business.

Q. You were the book-keeper for the firm from May, 1879, till about May, 1880?
A. Yes, sir.
Q. Who composed the firm on the 22nd day of March, 1880?
A. The same members.
Q. And they were who?
A. James S. Waterman, Henry Ketchum, and M. M. Ketchum.
Q. Can you state how the profits and losses were divided among the members of the firm?
A. No, sir; I haven't any knowledge.
Q. Was it a firm with limited liability, or were they all three general partners?
A. So far as I know, they were general partners. I never
118 saw any partnership papers or anything of that kind.
Q. Do you know who put money into the partnership business?
A. No, sir; that was before my time.
Q. How often did Mr. James S. Waterman come to La Crosse during the time you were employed by the firm?
A. Not very frequently; may be a dozen of times.
Q. Did he come each time to the office of Ketchum & Waterman?
A. I think he did.
Q. Did the firm have an office in the city of La Crosse?
A. Yes, sir.
Q. With a sign out, marked Ketchum & Waterman?
A. I think they had no sign at all; I don't recollect of seeing any.
Q. Did they use bill-heads?
A. Yes, sir.
Q. Marked Ketchum & Waterman?
A. They had bill-heads and letter-head; yes, sir.
Q. Did those bill-heads set forth the names of the partners?
A. I think not.
Q. Do you know of Mr. Waterman's ever using the bill-heads himself?
A. I do not.
Q. Did you ever see Mr. Waterman sign the firm signature?
A. I don't think I ever did.
Q. Do you know of his ever signing it?
A. Yes; I have seen his endorsement.
Q. You knew his handwriting?
A. Yes, sir.
Q. And you have seen his endorsement upon papers of the firm?
A. Yes, sir.
119 Q. Notes and things of that sort?
A. Notes are the only things I recollect ever seeing any endorsements upon.
Q. While you were book-keeper you saw notes endorsed in the firm name and the endorsements were in the handwriting of Mr. Waterman?
A. Yes, sir.

Objected to on the ground that the notes should be produced.

Q. Where are the books of account of the firm of Ketchum & Waterman?

A. I don't know.

Q. Were final accounts or stated accounts of the profits and losses sent to Mr. Waterman from time to time?

A. I don't think they ever had such a thing.

Q. He got his knowledge of the condition of the business, then, from his personal visits to La Crosse?

A. His personal visits and from their conversations generally.

Cross-examination by Mr. CARNES:

Q. You remember when the Black River Lumber Company was formed?

A. About the time; I don't recollect just when.

Q. It was some time in the fall of 1879, wasn't it?

A. I think it was in the fall of 1879.

Q. Do you understand that the firm of Ketchum & Waterman as a firm were in existence doing business after the formation of the Black River Lumber Company?

A. Yes, sir.

120 Q. What business do you understand they were doing after the formation of that company?

A. It was principally settling up their former business.

Q. Ketchum & Waterman had done a logging business in the winter of 1878 & 1879?

A. Yes, sir.

Q. Those logs came out in the summer of 1879?

A. 1879 and 1880. Those logs keep coming for years after they have been put in.

Q. But the bulk of them would come out in the summer of 1879?

A. In the following summer; yes, sir.

Q. Did you understand that the firm of Ketchum & Waterman did any new logging business after the Black River Lumber Company was formed?

A. No, sir.

Q. All they had to do after the Black River Lumber Company was formed was to take care of their old logs that came out and settle up their old accounts?

A. Yes, sir.

Q. How do you know that M. M. Ketchum was one of the members of the copartnership of Ketchum & Waterman?

A. From his own claim.

Q. As a matter of fact, he was on the ground here doing the principal part of the business at the time?

A. Yes, sir; he transacted most of the business, as far as we knew.

Q. And he himself claimed to be a member of the firm?

A. Yes, sir.

Q. You have no knowledge of what his interest was?

A. No, sir.

121 Q. Have you any knowledge from anything that James S. Waterman told you that he was a member of that firm?

A. Simply from his assenting to whatever he did. I don't know that the question ever came up between Waterman and myself.

Q. So far as James S. Waterman's acts and declarations threw any light on it, he might have been a member of the firm or an agent of the firm, either one?

A. Yes, I presume so; although he always signed the firm's name.

Q. But whether he signed it as one of the members or as agent you could not tell?

A. No, sir; only that he always claimed he was signing as a member; that is all.

Q. Did you ever know from the declarations of H. Ketchum whether M. M. Ketchum was a partner or an agent?

A. He always said he was a partner. He would say he had just as much interest in the business as any person, and whatever he said to do was right to be done.

Q. You were the book-keeper of the firm?

A. Yes, sir.

Q. And your immediate superior and the only man that you had to deal with, as a rule, on the ground was M. M. Ketchum?

A. Not the only one; they all gave instructions, but Mr. M. M. Ketchum was at the office most of the time and gave the principal orders.

Q. When did you last see the books of the firm?

A. The last time I saw them was just after they moved into the office adjoining MacDonnald Bros.' store—David Law's office; that is the last time I saw them.

122 Q. When was that?

A. That was in the spring, I think, of 1880.

Q. Do you know who had access to those books after that?

A. The only person that I believe had them was a young man by the name of Johnson, and he is dead. He came from Dexterville.

Q. The books are not there now?

A. No; I don't think they are; I have not looked for them, but I understand the books cannot be found.

Q. Do you know whether M. M. Ketchum had access to the room and place where they were kept?

A. I presume he had; it was open to any person.

Q. You have no knowledge of what has become of them since that time?

A. No, sir.

Q. There never was any written articles of copartnership, so far as you know?

A. Not so far as I know; no, sir.

Q. Your employment began in May, 1879?

A. I think it was May, 1879.

Q. Who had been acting as their book-keeper during the winter previous?

A. A man by the name of Scott was previous to me.

Q. Where is he?

A. I don't know.

Q. Do you know his first name?
A. I do not.
Q. Do you know whether he is living in La Crosse?
A. No; I never saw him since he left the office.
123 Q. Do you know where he was from?
A. I do not; I don't know anything about the man; I think he came from New London or wherever they came from; I think he had been working for them before they moved their office here, but I am not sure about that.
Q. Did you know of James S. Waterman using the firm name or signing or endorsing any notes in the firm name after the formation of the Black River Lumber Company?
A. No, sir.
Q. Do you know whether the firm was ever dissolved; and, if so, when?
A. The firm was dissolved by dissolution notice published in the "Chronicle" here. That is the only notice I have ever seen of the firm's dissolution.
Q. When was that?
A. I cannot give you exactly the date; I hunted it up once and, I think, it was in April, 1880.

Redirect examination by Mr. SHELDON:

Q. During the time that you were book-keeper for the firm of Ketchum & Waterman did you receive any letters from Mr. James S. Waterman, concerning the partnership business, making any enquiries about the condition of the business?
A. Several letters.
Q. From Sycamore, do you remember?
A. Yes, sir; usually; sometimes Sycamore and sometimes
124 on the train.
Q. And did you make replies to them?
A. Yes, sir; generally; we didn't always.
Q. Where are those letters now?
A. I think the most of them are destroyed, and what are not destroyed are in evidence in my own case. I think they were filed with the evidence in my own case.
Q. What case is that?
A. The case where I sued the firm for my wages.
Q. That is in what court; do you remember?
A. In the county court in probate, in De Kalb county.
Q. You have no letters in your possession?
A. No, sir; I might have some old ones, but I don't think I have. I think everything that was of any importance I used; otherwise they were destroyed.

W. A. SUTOR.

Subscribed and sworn to before me this 5th day of August, 1886.
A. HARRISON,
Notary Public, La Crosse, Wis.

125 FOREST J. SMITH, a witness called on behalf of the plaintiff herein, a resident at La Crosse, Wisconsin, more than 100 miles from the place where this case is to be tried, being duly cautioned and sworn to tell the whole truth and being carefully examined, deposes and says as follows:

Examined by Mr. SHELDON:

Q. State your name, residence, and business.

A. Forrest J. Smith; La Crosse, Wisconsin; book-keeper for the lumber inspector.

Q. Do you know the firm of Ketchum & Waterman?

A. Yes, sir.

Q. Were you ever in the employ of the firm?

A. Yes, sir.

Q. Between what dates?

A. I commenced in the month of August, 1879, either the last of July or first of August, I don't remember exactly which.

Q. And remained until about when?

A. The formation of the Black River Lumber Company, in October. the same year.

Q. Who composed the firm of Ketchum & Waterman while you were in their employment?

A. H. Ketchum, M. M. Ketchum, and James Waterman.

Q. Where did James S. Waterman live?

A. Sycamore, Illinois.

Q. During the time you were in the employ of that firm about how often did Mr. Waterman come to La Crosse on the firm's business?

126 A. I saw him here several times; I don't remember how many. I saw him before I was with the firm. I wrs introduced to him before I was with the firm.

Q. Were you introduced to him as his being a member of the firm of Ketchum & Waterman?

A. I don't know as it was specified he was a member of the firm. Billy introduced him to me and I understood he was a member.

Q. By Billy you mean M. M. Ketchum, one of the partners?

A. Yes, sir.

Q. Where did the firm have their office when you were in their employ?

A. On Front street, in La Crosse.

Q. Did you ever see Mr. Waterman in the office?

A. Yes, sir.

Q. What brought him to the office?

A. To look after his interests, I suppose.

Q. He was there exercising apparently the authority of a member of the firm?

A. He seemed to be.

Q. When the Black River Lumber Company was formed I understand you to say you went into the employ of that company?

A. Yes, sir.

Q. And remained until about when?

A. Remained until a receiver was appointed, and then remained with the receiver till the matter was settled up.

Q. A receiver was appointed, the record shows, the 17th of April, 1880?

A. Yes, sir.

Q. Was the firm of Ketchum & Waterman then in existence?

A. Yes, sir.

Q. Was Mr. James S. Waterman a partner of the firm at that time?

A. Supposed to be.

127 Q. What was the business of the firm at that time?

A. Logging.

Q. Buying and selling logs?

A. Selling, principally; logging and selling logs.

Q. Was M. M. Ketchum connected with the Lumber Company in any way, do you remember?

A. Yes, sir; he had stock in it, and he was manager.

Q. He was the general manager besides?

A. Yes, sir.

Q. And he was also the acting manager for the firm of Ketchum & Waterman?

A. Yes, sir.

Q. Conducted the business of both the firm and the company?

A. Yes, sir.

Q. And the business of both the firm and the company, I understand you to say, was very much alike?

A. The same thing.

Q. It was composed chiefly getting out logs from the Black river?

A. Yes, sir.

Q. Getting out logs off lands formerly owned by Ketchum & Waterman?

A. In part.

Q. And also by the Bank of Fort Madison, in part?

A. Yes, sir.

Q. Do you remember how long M. M. Ketchum was the manager of the Black River Lumber Company?

A. Until the receiver was appointed, the 17th of April.

Q. From its formation, in October, 1879, down to the 17th of April, 1880?

A. Yes, sir.

Q. Do you know of Mr. Waterman's making any transac-

128 tions in the name of the firm of Ketchum & Waterman, or doing any act which indicated his being a member of that firm?

Q. Not directly; no.

A. You know he was frequently here engaged in the transaction of business?

A. Yes, and I talked with him about business appertaining to the firm and considered what he said of as much weight as anybody else.

Cross-examination by Mr. CARNES:

Q. After the formation of the Black River Lumber Company the firm of Ketchum & Waterman did no other business than to take care of their logs that they cut the year before and settling accounts?

A. That is all.

Q. The tracts of land from which they had logged the year before were all put into the Black River Lumber Company, as I understand it?

A. I think so.

Q. Did you know of any articles of copartnership or writing showing who the members of the firm of Ketchum & Waterman were?

A. I never saw any.

Q. Never heard of any, did you?

A. Well, I always supposed that there was some, but I could not say.

Q. You supposed it because there ought to have been some?

A. I guess I heard Billy say so, although I didn't place
129 much dependence on what he said about anything.

Q. From whom did you get your information that M. M. Ketchum was one of the firm?

A. From M. M. Ketchum and Henry Ketchum and, I think, James S. Waterman.

Q. Do you remember Waterman telling you at any time that M. M. Ketchum was a member of the firm?

A. I could not say that he told me he was a member of the firm. I used to have charge of the river business from here to Onalaska, and him and Billy would come up at different times and they have talked to me about what to do, &c., and Waterman seemed to have as much to say about orders as anybody else and they consulted with each other. He dictated as much as anybody, apparently, when he was here.

Q. I am speaking about M. M. Ketchum being a member of the firm. M. M. Ketchum was on the ground managing the business of the firm?

A. Yes, sir.

Q. What interest he had as partner or otherwise you didn't know, except from M. M's. own statement?

A. That is all, and hearsay evidence.

Q. You never saw any letter-head or bill-head that had the names of the individual members of the firm on it, did you?

A. Nothing but the name of Ketchum & Waterman.

Q. You don't know where the books of the firm are?

A. No, sir.

Q. Did you see them after the Black River Lumber Company was formed?

A. Yes, sir.

130 Q. When did you last see them?

A. I saw them in Dave Laws' office—in the back part of it—corner of Front and Main streets.

Q. When was that?
A. That was the following summer.
Q. In 1880?
A. 1880.
Q. Whose charge were they in then?
A. Billy formerly had an office there, and it was after his office was sold out by the sheriff I went in to see something about the books. I think Mr. Sutor was with me. I went in to see about some account.
Q. When did you go again and find them gone?
A. It might have been a week or two afterwards.
Q. They were in the place where Billy had an office?
A. Yes, sir; where he used to have an office.
Q. You have no knowledge of who took them away?
A. I think Billy told me he had them. I think he told me they were in Merrillon after that, but I could not say positively.
Q. When you speak of Billy in this deposition you mean M. M. Ketchum?
A. Yes, sir.

Redirect examination by Mr. SHELDON:

Q. If I understand your testimony you state that between the formation of the firm of Ketchum & Waterman and the time the receiver was appointed, in April, 1880, Mr. James S. Waterman was a general member of the firm of Ketchum & Waterman?
131 A. So considered.

FORREST S. SMITH.

Subscribed and sworn to before me this 5th day of August, 1886.
[SEAL.] A. HARRISON,
Commissioner, Notary Public, La Crosse, Wis.

E. E. BENTLEY, a witness on behalf of the plaintiff herein, a resident at La Crosse, Wisconsin, more than 100 miles from the place where this case is to be tried, being duly cautioned and sworn to tell the whole truth and being carefully examined, deposes and says as follows:

Examined by Mr. SHELDON:

Q. Please state your name, residence, and occupation.
A. Edwin E. Bentley; La Crosse, Wisconsin; cashier of the Batavian Bank.
Q. How long have you been cashier of the Batavian Bank?
A. About 13 years.
Q. Did you know James S. Waterman in his lifetime?
A. I met Mr. Waterman.
Q. Did you know the firm of Ketchum & Waterman?
A. Yes, sir; we did business for the firm.
Q. Who composed the firm of Ketchum & Waterman?

A. According to our information, it was composed of H.
132 Ketchum, James S. Waterman, and M. M. Ketchum.

Q. Did the firm of Ketchum & Waterman bank with the Batavian Bank?

A. Yes, sir; they did at one time.

Q. During what period?

A. During the fall of 1879 and spring of 1880.

Q. In what name was the account kept?

A. Ketchum & Waterman.

Q. Did Mr. Waterman ever come to the bank at any time on business?

A. Yes, sir; he was there one time that I remember of particularly. I think he was there 2 or 3 times; I remember once particularly.

Q. What was the occasion of the particular visit you have in mind?

A. I think he came in with Mr. Ketchum and had some conversation with us in regard to business matters, inquiring in regard to the condition of the firm's business with us, money on hand and money we loaned, &c.

Q. Was there any discussion or talk at that time about a loan to be made to the firm of Ketchum & Waterman by the Batavian Bank?

A. I think Mr. Waterman said something about an amount they would likely want; some conversation of that character.

Q. Was the loan made?

A. We loaned them; yes, sir.

Q. Do you remember about when that took place?

A. I think that was either in the fall or early winter of 1879; that is my recollection of it.

Q. Do you remember whether it was before or after the formation of the Black River Lumber Company?

A. I think it was before.

133 Q. How long did that partnership last, as far as you know?

A. I could not say in regard to that; I have no definite recollection of the time of the dissolution of the partnership.

Q. Who were the members of the firm at the time of its dissolution?

A. I never knew of any change in the firm or that it was composed of different parties than those I have mentioned.

Cross-examination by Mr. CARNES:

Q. Where did you get your information that M. M. Ketchum was a member of the firm?

A. He told me it himself.

Q. Do you remember hearing either of the other members of the firm say so?

A. I could not say in regard to that; I don't remember that I ever did. I remember a conversation of M. M. that he stated to me that those three partners constituted the firm. M. M. did the business.

Q. You never saw any writing that showed who the members of the firm were, did you?

A. I think I was shown by M. M. Ketchum a writing or terms of agreement between the three parties stating the condition of the membership of the firm. I think he showed me such a writing.

Q. Signed by the three parties?

A. Yes, sir; I think so. I know he showed me some papers in connection with that, and my recollection now is that among those papers was one containing the terms of partnership.

134 Q. That was a partnership for the purpose of logging the year preceding the formation of this Black River Lumber Company?

A. Yes, sir; I should think so.

Q. Do you remember, now, what M. M. Ketchum's interest was?

A. No, sir; I do not.

E. E. BENTLEY.

Subscribed and sworn to before me this 5th day of August, 1886.

[SEAL.] A. HARRISON,

Commissioner, Notary Public, La Crosse, Wis.

The defendants, to maintain the issues on their part, introduced the following evidence—that is to say, testimony of Milo Smith and stipulation of counsel as to testimony of Alden:

135 By agreement of counsel the deposition of Milo Smith, on behalf of the defendants, was taken at the same time and place above mentioned, as follows:

MILO SMITH, having been duly sworn on behalf of the defendants, was examined by Mr. WILSON, and testified as follows:

Q. What is your name, age, occupation, and place of residence?

A. Milo Smith; sixty-eight; dealer in real estate; Clinton, Iowa.

Q. Were you acquainted with James S. Waterman in his lifetime?

A. Yes, sir; I was.

Q. Did you know his handwriting?

A. Yes, sir.

Q. Did you know Henry Ketchum?

A. Yes, sir.

Q. Did you know his handwriting?

A. Yes, sir.

Q. Look at the document now shown you, and state whose signatures are attached thereto. (Hands witness paper marked Smith "Exhibit One.")

A. The signatures of Henry Ketchum and James S. Waterman.

Counsel for defendant offered in evidence the paper shown to witness, and asked that it might be attached to the deposition.

Q. Did you at any time act as agent of James S. Waterman

in connection with the affairs of the Black River Lumber Company?

A. I did.

Q. When?

A. From the spring of 1880 to 1882.

Q. Did you, in that connection, know anything about his
136 relations to Henry Ketchum?

A. I knew that they had been partners before that, and they had unsettled business as partners that I settled up for Waterman.

Q. That you settled up for Waterman?

A. Yes, sir; matters that he was liable for under the partnership.

Q. Was the partnership still an existing partnership when you represented Waterman in Wisconsin during the time you mentioned?

A. No, sir.

Q. Were you present at Fort Madison, Iowa, when the subject of a reconveyance to the stockholders of the Black River Lumber Company of the lands held by Beck, as trustee, was discussed?

A. Yes, sir.

Q. Did you hear the discussion?

A. Yes, sir; Mr. Waterman and I went there for the purpose of closing it up and getting a conveyance from Judge Beck.

Q. What interest did you have in the matter that time, or why were you present?

A. Well, I was present as Mr. Waterman's agent, and I had been settling up the matter in Wisconsin, and I had at that time a judgment against the Black River Lumber Company.

Q. Did you hear the arrangement made in regard to a reconveyance between the parties?

A. Yes, sir.

Mr. SHELDON: That question is objected to on the ground that if there was any action then taken by the stockholders of the Black River Lumber Company it should appear from the minutes of the stockholders' meeting, and that any other arrangement
137 not in writing cannot be gone into.

Mr. WILSON: Was this meeting at Fort Madison, Iowa, a formal meeting of the stockholders of the company?

A. No, sir; it was not a called meeting of the stockholders.

Q. Was there any record of the meeting kept upon the books of the company?

A. The books were not there.

Q. Now, you may state what was said in regard to a reconveyance of the lands at that meeting at Fort Madison, Iowa, and by whom it was said, as nearly as you can.

Objected to as before.

A. The agreement that had been made by the stockholders—by a resolution of the stockholders—at La Crosse was that the lands that had been conveyed to Judge Beck by the Fort Madison parties were to be reconveyed to them by Judge Beck. The land that

Ketchum & Waterman put into the Black River Lumber Company, deeded to Judge Beck as trustee, was to be conveyed to Mr. Waterman. One of the considerations of the release was that I was to release their land from the effect of that judgment, and I gave them a release releasing their portion of the lands from the judgment that I held against the Black River Lumber Company.

Q. Was there anything said about the release at Fort Madison?

A. It was done at Fort Madison; that was the agreement; the agreement was made there in the bank at Fort Madison that I was to release their land from the operation of that judgment, and I made the release as a part of that transaction.

138 Q. Who was present when the agreemeent was made?

A. I think all the stockholders were there, Brewster and Smith, and Atlee and Kretzinger; that meeting was not recognized as a meeting of stockholders; it was only recognized as a meeting of individuals interested in the property.

Q. But the individuals who were there constituted all the stockholders?

A. No; the Ketchums were not there.

Q. The persons you have named were there?

A. Yes, sir; those that I have named were there; they were the parties that were interested in the reconveyance of the land only.

Q. Was there anything said on that occasion about the endorsement of the names of Ketchum and Waterman on the back of the note for $10,000 held by the Bank of Fort Madison?

A. Yes, sir.

Q. What was said, and by whom, on that occasion?

A. Mr. Waterman stated to them that Mr. Ketchum had no authority to make that endorsement, that they were not partners, and had not been for months, when that endorsement was made, and that he had no right to make that endorsement.

Q. Was there anything else said?

A. The understanding was that Mr. Waterman was to be released from that endorsement on the $10,000 as one of the considerations of this settlement, and he so understood it.

Mr. SHELDON: The answer is objected to in so far as it states the understanding that Mr. Waterman was to be released from this endorsement; also that the declarations of Mr. Waterman made after the execution of the endorsement on the notes are

139 immaterial.

Mr. WILSON: Have you stated fully the agreement between the parties in regard to the reconveyance and the release of the judgment on your part? If not, state what further was said at that time.

Objected to as before.

A. I don't recollect anything that is material, but, of course, during the negotiations there was a vast amount of talk there all day long, and it took away into the night before it was closed up finally.

Q. What was the complete agreement that was made, as you understood it there, between the parties?

Same objection.

A. The agreement was that the land that the Fort Madison parties had conveyed to Judge Beck, as trustee, was to be reconveyed to them; that the land that Ketchum and Waterman had conveyed to him was to be reconveyed to J. S. Waterman, and I was to release the judgment lien on the Fort Madison portion of the land.

Q. Was there anything said about the claim of the bank at Fort Madison?

A. Not that I know of at that time; I didn't hear any discussion about it; that didn't connect itself with the transfer of the land.

Q. Did it connect itself with the release of the judgment on your part?

A. No, sir.

140 Cross-examination by Mr. SHELDON:

Q. You say you were present as the agent of Mr. Waterman at this settlement, Mr. Smith?

A. Yes, sir.

Q. And that it was formally agreed between the persons then present that Mr. Waterman should be relieved from his liability as endorser on this note?

A. It was an agreement between Dr. Smith and Waterman together; they were sitting in the bank.

Q. Between Dr. Smith, as representing the bank, and Mr. Waterman, representing himself?

A. Yes, sir; they sat in the bank right at the end of the counter when the question was discussed.

Q. What was the consideration of that release?

A. The settlement.

Q. The entire general settlement?

A. Yes, sir.

Q. Did Mr. Waterman ask for his note—did he take up his note with his endorsement on it?

A. I suppose there were other endorsements on the note and he couldn't take it up.

Q. Did he ask for any particular release or did he get any written release of his liability?

A. I don't recollect of his getting any at that time.

Q. Did you ever see any written release of his liability on that note?

A. I don't recollect whether I have ever seen it or not.

Q. Did he ever demand of Dr. Smith a release of his liabil-
141 ity when you were acting as agent of Waterman?

A. Mr. Waterman represented himself.

Q. He didn't ask for it himself, did he?

A. He had a written release drawn up; whether it was signed or not I don't know.

Q. Then he didn't attempt to make Dr. Smith sign a written release?

A. Well, it was in the course of conversation before any of the papers were signed, when they were discussing that.

Q. You don't know whether that was signed or not?

A. I can't say, only from what Mr. Waterman told me; that is the only way I know it; I didn't see it signed.

Q. Mr. Waterman, then, it seems, knew that Mr. Ketchum was representing that there was a firm of Ketchum & Waterman, did he not?

A. He knew from what they said to him that he had endorsed that note.

Q. And at the time when he came up to Fort Madison he wanted to be let off of that endorsement, did he not?

A. Yes, sir.

Q. And he brought with him a written release of his liability upon that note, did he not?

A. He had one drawn up; yes, sir. I won't say whether he brought it with him, or whether it was drawn up there.

Q. But you know there was one there at that time?

A. Yes, sir.

Q. And that note was to the order of the Bank of Madison, was it not?

A. I don't know; I never saw the note.

Q. Mr. Waterman wanted to have his release run from the bank, did he not?

A. He wanted to be released on the endorsement.

142 Q. You don't know, then, who the maker of that note was?

A. No, sir.

Q. Nor how much it was for?

A. All I know about the note is just hearsay and talk; I don't know that I ever saw the note. I heard the thing discussed.

Q. Mr. Waterman knew at that time, did he not, that the Bank of Fort Madison had a claim against the Lumber Company of sixty-odd thousand dollars?

A. I don't know whether he knew the amount or not.

Q. He knew there was a claim there?

A. I don't know whether he knew anything more than I did, which was hearsay.

Q. Didn't they explain the matter to him about the affairs of the Lumber Company—how they then stood?

A. The Black River Lumber Company, so far as I had anything to do with it—the condition of the Lumber Company—I didn't have anything to do with the claim of the Fort Madison Bank against the Black River Lumber Company.

Q. You knew it had a claim, didn't you?

A. I knew from hearsay only.

Q. Didn't you know as a matter of fact that it had a claim, and that you also had a claim, and that it was a very serious question in the courts up there whether your claim had priority over the claim of the bank?

A. Yes; I knew they had a claim, but I say it was only a matter

of hearsay. I never saw the paper, and never saw anything of it, only they told me they had a claim.

143 Q. But you knew that they were contesting the priority between your claim and their claim?

A. Yes, sir.

Q. I suppose you explained all that to Mr. Waterman, did you not?

A. Yes, sir.

Q. He knew, then, that the bank had an undetermined claim against this Lumber Company?

A. I suppose he did; yes, sir.

Q. And he took these lands back, knowing that, did he not—he took these lands back from the Lumber Company, knowing that there was an undetermined claim brought by the bank?

A. Yes, sir; I suppose he knew that there was an unsettled matter there; both tracts of land were in the same condition, both heavily mortgaged.

Q. And the reconveyance to Mr. Waterman, then, was subject to this possible claim the bank might establish, was it not?

A. No, sir; I don't think there was any such understanding, because it was a mortgage for the purchase-money, and this judgment that I held of $31,000 was the original purchase-money of that land. It made the claim pretty near $100,000 against that tract.

Mr. WILSON: Mr. Smith, did you at this interview, at Fort Madison, state that there was money enough in the receiver's hands to pay the claim of the Bank of Fort Madison?

A. No, sir.

Q. Did you ever make that statement to anybody?

A. No, sir.

Signature waived.

144 JOSEPH A. SMITH was recalled by Mr. SHELDON and testified as follows:

Q. Dr. Smith, you have heard Milo Smith's testimony about releasing Mr. Waterman from his liability to the bank as endorser upon his note of $10,000? Please state the facts about that.

A. Mr. Milo Smith's testimony refreshes my memory somewhat; I believe he is correct about the release releasing his judgment, and I sent that release up to the receiver and the receiver wouldn't accept it; he wrote to me that he couldn't make a settlement until there was a release of all the land; I told him then to correspond with Mr. Smith, and afterwards he made a settlement; that is all I know about it.

Q. (Question repeated.)

A. My recollection is there was no release at all given, and none promised. I would be very foolish to do anything of the kind.

It is stipulated by counsel, in order to avoid calling as a witness Philando M. Alden, one of the executors of the Water-

man estate, that if said Alden were called he would testify that he was the financial clerk and business manager of James S. Waterman for more than ten years prior to his death; that he had access to and knowledge of all his papers, including his correspondence, and that said Alden would testify, from his knowledge so acquired, that there never was any partnership existing between
145 Henry Ketchum and said Waterman, except such partnership, if any, as may have been created under the articles of agreement offered in evidence, marked Smith "Exhibit 1," and that this stipulation shall have the same force and effect as the deposition of said Alden containing his testimony to the effect above set forth would have if regularly taken in this case.

It is further stipulated that the original bill filed by Joseph A. Smith and Charles Brewster against the defendant in this case in the circuit court of the United States for the northern district of Illinois, case No. —, shall be considered and treated as offered in evidence in this case.

Articles of Agreement between H. Ketchum and J. S. Waterman.

146 Memorandum of an agreement made and entered into the 25th day of June, A. D. 1878, by and between H. Ketchum, of New London, Wisconsin, of the one part, and James S. Waterman, of Sycamore, Illinois, of the other part, witnesseth:

That whereas the said parties have lately purchased of and from the Chicago, St. Paul and Minneapolis Railroad Company certain pine lands situated in the counties of Clark and Jackson, in the State of Wisconsin, and are now the owners in fee of the same as tenants in common;

And whereas the said purchase was made by said Waterman at the solicitation and on the representation of the said Ketchum:

Now, therefore, in consideration of the premises, the said Ketchum hereby agrees to devote his entire time to the supervision of the said lands, finding purchasers for the same or the timber thereon, and negotiating sales, paying taxes, and doing all other things necessary and proper in the premises which, by reason of his greater experience in such business and his nearer residence to said lands, he is better qualified to do.

It is further mutually agreed by the parties that in case of the death of either party during their joint ownership of the said lands or any part thereof the survivor shall have the right and it shall be his duty to carry on the business and make settlements and manage and control the property in the same manner and to a like extent as if the said parties were partners in business; and said sur-
147 vivor shall have all rights and powers in the premises which he would lawfully have if he was a surviving partner.

It is further mutually agreed that each of the said parties is to be allowed interest on all moneys paid by him on the original purchase price of said land at the rate of ten per cent. per annum, payable annually.

It is further agreed that all the personal expenses of either party

incurred in and about the joint affairs shall be reimbursed to him out of the proceeds of sales of property.

It is understood that nothing in this agreement contained shall be construed to prevent or hinder said Waterman from participation in the management of said property or the business that may grow out of the same, as he shall see fit.

The proceeds of all sales of property shall be used to complete the payment of the purchase price of said lands until the same is fully paid, after which the same is to be equally divided between the parties.

In all respects not specifically mentioned in the foregoing agreement the rights of the parties shall be governed and settled by the law applicable to tenants in common, which character both parties claim to hold with respect to each other.

In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year aforesaid.

H. KETCHUM.
J. S. WATERMAN.

148 *Bill of Complaint, Case No.* 19568. *Filed in said Court by Joseph Smith and Others against Defendants herein.*

UNITED STATES OF AMERICA, *Northern District of Illinois:*

In the Circuit Court of the United States for the Northern District of Illinois. In Equity.

To the Honorable Walter Q. Gresham, judge of the said court:

Your orators, Joseph A. Smith, Charles Brewster, J. C. Atlee, Samuel Atlee, and William H. Kretsinger, who are severally citizens of the State of Iowa, bring this their bill of complaint against Philander M. Alden and George S. Robinson, executors of the estate of James S. Waterman, deceased, who are severally citizens of the State of Illinois, as were also the said James S. Waterman during his lifetime and at the time of his death.

And thereupon your orators complain and say that on or about November third, 1879, and under and by virtue of the general laws of the State of Wisconsin then in force relating to the formation of private corporations, which said laws are to be found at length in the Revised Statutes of the said State of Wisconsin, as published by the authority of said State, for the year 1878, and the amendments thereto enacted in the year 1879, reference being thereunto had for greater certainty, there was duly formed a body corporate under and by the name and title of "The Black River Lumber Company," with a capital stock of four hundred and
149 thirty-seven thousand five hundred dollars, divided into forty-three hundred seventy-five shares, of one hundred dollars each, all of which will more fully appear from the original articles of incorporation of the said Black River Lumber Company, the original whereof or a duly certified copy of which from the records will be produced and proved upon the hearing hereof.

And your orators further show unto your honors that — a meeting of the persons named as incorporators in said articles of incorporation held at the office of Messrs. Wing & Prentice, in the city of La Crosse and State of Wisconsin, on the third day of November, 1879, the following subscriptions were made to the capital stock of the said company, to wit:

J. S. Waterman	1,250 shares.
H. Ketchum	625 shares.
M. M. Ketchum	625 shares.
J. C. Atlee	468 shares.
Samuel Atlee	469 shares.
Charles Brewster	235 shares.
Joseph A. Smith	235 shares.
William H. Kretsinger	468 shares.

By which said subscriptions the entire capital stock was taken, and on the same day and at the same place a meeting of said subscribers as stockholders of the said "The Black River Lumber Company" was held and organization of said company had and made, a board of directors elected, of whom the said J. S. Waterman was one; and the said company thereupon commenced a logging,
150 lumber, and land business under the said articles of incorporation, and continued doing such business until April 17th, 1880.

And your orators further show unto your honor that they and each of them have paid in full to said company the respective sums subscribed for by them, and that nothing now remains due upon the said several subscriptions or upon the stock severally issued to your orators representing such subscriptions.

And your orators further show unto your honor and state the fact to be that upon the several subscriptions made to said capital stock by said J. S. Waterman, H. Ketchum, and M. M. Ketchum no more than forty (40) per centum was ever paid by any one of said subscribers on his subscription, and that there now remains unpaid upon the said subscriptions of J. S. Waterman, H. Ketchum, and M. M. Ketchum, and each of them, sixty (60) per cent. of the amount thereof.

And your orators further show unto your honor that between the time the said Lumber Company commenced business as aforesaid and April 17th, 1880, the said company became and was largely indebted to various persons for labor, supplies, and running expenses; that the said company was then and ever since has been completely out of moneys, funds, or property with which to pay the said indebtedness; that said indebtedness amounted to upwards of seventy-five thousand dollars; all of which was then past due and unpaid, much the larger part of which was for labor and supplies, and for which lien and attachment suits were threatened to
151 be brought; that your orators, at the request of the said Lumber Company, and from time to time between the said dates, did, in order to pay off the said indebtedness of the company, advance and loan to the said company various sums

amounting in all, on January 18th, 1884, to the sum of seventy-two thousand three hundred and sixty-six and $\frac{14}{100}$ dollars; all which was advanced by your orators at the said company's request, and was actually used by the said company in paying off its said indebtedness for labor and supplies and other running expenses lawfully incurred in the business authorized by its said articles of incorporation, and for which said advances and loans so made from time to time by your orators the said Lumber Company executed and delivered its promissory notes, a portion of which were payable to the Bank of Fort Madison, as the agent of your orators, and the remainder to the order of your orators or some of them, in and by which notes the said Lumber Company promised to pay, at times varying from one to six months, the amounts of such advances, together with interest thereon at the rate of eight per cent. per annum until paid; and which said sum of $72,366.14, together with interest thereon from January 17th, 1884, still remains wholly due and unpaid.

And your orators further show unto your honor that on April 8, 1880, the said Black River Lumber Company had become and was and ever since has been insolvent and unable to pay its debts or meet its just obligations, and that on or about said date two
152 of its said stockholders, to wit, H. Ketchum and M. M. Ketchum, filed a bill in the circuit court of La Crosse county, in the State of Wisconsin, their bill of complaint against the said The Black River Lumber Company, your orators, and others, and upon which such proceedings were had which resulted, April 17th, 1880, in the appointment by the said court of a receiver to take possession of all the property and effects of the said Lumber Company and to sell and dispose of the same and apply the proceeds to the payment of the debts of the said company; that said receiver at once duly qualified and took immediate possession of all the said property and effects of the said company and continued to hold and manage the same up to the time of his final discharge, to wit, on January 18, 1884; that on or about September 6th, 1880, the said proceedings were duly removed into the circuit court of the United States for the western district of Wisconsin, and then proceeded to final determination, and in which proceedings the said Lumber Company was wound up and all its liabilities fixed and assets disposed of; that by the final decree of said court entered on said January 18, 1884, a certified copy whereof will be produced and proved on the hearing hereof, and reference to which is hereby made, the said indebtedness of the Black River Lumber Company to the Bank of Fort Madison, representing your orators, was adjusted and allowed at the said sum of $72,366.14.

153 And your orators further show unto your honor that under the orders of the said courts the said receiver sold all the assets and property of the said company, except his right to proceed against the said defendants, and applied the proceeds thereof in payment of the debts of the said corporation, so far as the same would go; that the said proceeds were sufficient to and did pay off all the indebtedness of the said Lumber Company, except the said sum of

$72,366.14, due to your orators as aforesaid, and that there are now no other creditors of the said Black River Lumber Company except your orators.

And your orators further show unto your honor that the said Bank of Fort Madison, through which, as the agent of your orators, a portion of the advances were made, was and is a corporation created by and existing under the laws of the State of Iowa; that all the stock of said bank is owned solely by your orators, Joseph A. Smith and Charles Brewster, and that no other person or corporation is in any way interested in the same; that at the time of said advances the said Charles Brewster was and is now the president of said bank and Joseph A. Smith is the cashier thereof.

And your orators further show unto your honor, and state the fact to be, that from and ever since April 17, 1880, the Black River Lumber Company has been and is insolvent, and from and ever since said last-named date has neglected and refused to pay and discharge its notes and other evidences of debt, and from and
154 ever since said date has suspended its ordinary and lawful business and still suspends the same, by reason whereof, and in accordance with section 1763 of the Revised Statutes of the State of Wisconsin for the year 1878, the said corporation has surrendered the rights, privileges, and franchises granted or acquired under any law, and is now and has been long since dissolved and without existence.

And your orators further show unto your honor that on or about July 19th, 1883, the said J. S. Waterman, then and for many years prior thereto a citizen of the State of Illinois, departed this life, having theretofore made his last will and testament, in writing, in and by which the defendants, Philander M. Alden and George S. Robinson, were appointed executors thereof, and that thereupon the said defendants duly proved the said last will and testament in and before the county court of De Kalb county, in the State of Illinois, and, having duly qualified as such executors, have taken upon themselves the execution thereof, and are now acting as such.

And your orators further show unto your honor that the said H. Ketchum and M. M. Ketchum were at the time of said advances and are now citizens of the State of Wisconsin and residents thereof, and without the jurisdiction of this court, and that the said H. Ketchum and M. M. Ketchum and each of them were at the time of the said advances, ever since have been, and now are wholly insolvent, without means whatsoever, and execution-proof; and your orators state the fact to be that no portion of your orators' said debt could ever or can now be collected from them or either of them.

155 In consideration whereof and to the end that the said Philander M. Alden and George S. Robinson, executors of the estate of James S. Waterman, deceased, may, without oath (their oaths and the oaths of each of them being hereby waived in pursuance of the statute in such case made and provided), full, true, direct, and perfect answer make to all and singular the matters and things hereinbefore stated and charged, and that they may particu-

larly answer how much was paid in by the said James S. Waterman or by them on his said subscription, and that an account may be taken of the amount paid by the said James S. Waterman upon his subscription to the stock of said company and of the amount yet unpaid thereon;

And that said defendants may be decreed to pay, in due course of administration, so much of the balance found unpaid on the stock subscription made by the said James S. Waterman as will be sufficient to pay the indebtedness of the said company due to your orators as aforesaid;

And if upon such accounting it should appear that as against your orators the stock subscription made by the said James S. Waterman was fully paid, then and in that event and in consideration of the foregoing your orators pray that an account may be taken of the sums so advanced by your orators to said company and still unpaid, and that the said defendants may be decreed to pay and contribute to your orators their just proportion and share of the sums so advanced and their just proportion and share of the debts of the said Black River Lumber Company paid by the advances made
156 by your orators as aforesaid, and that your orators may be further and otherwise relieved in the premises as the nature of the case may require and according to equity and good conscience may seem proper;

And as to the said H. Ketchum and M. M. Ketchum the remainder of said stockholders, who are without the jurisdiction of this court as aforesaid, your orators pray that process may issue to make them parties to this bill, if they should come within the said jurisdiction:

May it please your honor to grant unto your orators the usual process issuing out of and under the seal of this honorable court, to be directed to the said Philander M. Alden and George S. Robinson, executors of the estate of J. S. Waterman, deceased, therein and thereby commanding them, on a certain day and under a certain penalty to be therein inserted, that they personally be and appear before this honorable court, then and there to answer the premises and to stand to, abide by, and perform such order and decree therein as to this court shall seem proper and shall be agreeable to equity and good conscience.

And your orators will ever pray, &c.

JOSEPH A. SMITH.
CHARLES BREWSTER.
S. ATLEE.
J. C. ATLEE.
W. H. KRETSINGER.

THEODORE SHELDON,
Solicitor and of Counsel.

Endorsed: Filed April 10, 1885. Wm. H. Bradley, clerk.

157 *Stipulation as to the Appointment of a Receiver of Property of the Black River Lumber Company, in Wisconsin, in the Suit of Ketchum and Others against the Black River Lumber Company and Others.*

Order of Wisconsin court appointing receiver upon above stipulation.

158 It is hereby stipulated by and between the parties hereto that William R. Sill, of La Crosse, Wis., may be appointed receiver of the property and effects of the Black River Lumber Company immediately by and on presentation of this stipulation to the Hon. A. W. Newman, judge of this court, and that in addition to the usual powers that the said receiver have full power to manage and control the said property and sell and dispose of the same in the usual and customary course of the trade for cash or on credit, as may appear to be for the best interests of the parties interested, and apply the proceeds of such property to the payment of the debts of said Black River Lumber Company, in such order of preference as *in* the court shall direct, and as soon and whenever such debts shall all be paid the said receiver shall be discharged and so much of said property as may be undisposed of shall be returned to said Black River Lumber Company; and it is further agreed that the said receiver give security for the faithful discharge of said trust in the sum of twenty-five thousand dollars, with sureties to be approved by the judge of this court, and as soon as the receiver shall be appointed and the security approved the bill of sale now on file and any chattel mortgage heretofore executed to said Bank of Fort Madison shall be cancelled; but it is understood that any and all sums of money advanced by the Bank of Fort Madison, whether before or after the execution of said bill of sale or chattel mortgage,
159 used in caring for or preservation of the property of or in payment of the debts of said Black River Lumber Company, shall be a charge against said company; and it is further agreed that as soon as the receiver is appointed and the security approved the said M. M. Ketchum, as general manager of said Black River Lumber Company, turn over and deliver to the said receiver all the property and effects of the said company in his hands as such general manager.

Dated April 17th, 1880.

G. C. PRENTISS, *Plaintiff's Attorney.*
CAMERON, LOSEY & BUNN,
Defendants' Attorney.

On the same day the court made the following order:

"On reading and filing the complaint in this action and the accompanying affidavits, and also the stipulation of the parties to this action presented to this court with said application, and which said stipulation is in substance as follows, to wit:

* * * * * * *

Ordered, That the said William R. Sill be, and he is hereby, appointed receiver of all the property, assets, and effects of the said Black River Lumber Company, or held by it; that the said receiver give a bond, with sureties, in the sum of twenty-five thousand dollars, to Charles Smith, as clerk of this court, to be approved by the judge of this court.

160 Also ordered that the said receiver have the usual power as such receiver and all the rights and powers conferred upon him by the said stipulation presented to this court and above set forth."

161 And thereupon, on the 16th day of June, 1887, after submission of the case to the court upon the above testimony, and before decision and decree therein, the complainant filed its petition for a rehearing of said cause, with affidavits thereto, as follows:

Bill.

In the Circuit Court of the United States, Northern District of Illinois. In Equity.

BANK OF FORT MADISON *against* PHILANDER M. ALDEN *et al.*

To the Hon. W. Q. Gresham:

Your petitioner, The Bank of Fort Madison, respectfully shows unto your honor that it is the complainant in the above action; that said action is pending in this court upon bill, answer, and proofs heretofore taken herein; that upon such proofs the cause has been heard by the court and is now held under advisement and that no decree has yet been entered herein; that since said hearing your petitioner has discovered, and first learned from an intimation made by this court to counsel in this cause, that your petitioner's proofs

162 upon one of the issues herein are inaccurate and incomplete and do not fully show the true material facts involved; that the said issue is whether certain lands of the Black River Lumber Company described in the bill of complaint herein were reconveyed in March, 1882, to James S. Waterman, with or without a relinquishment of the right of your petitioner as a creditor of said Lumber Company to follow said lands or the proceeds thereof.

That from said intimation of the court it appears that the court construes the testimony of Joseph A. Smith, the cashier of your petitioner, as showing that the right of your petitioner, as a creditor of the Lumber Company, to follow said lands or the proceeds thereof was relinquished at the time of the agreement for the reconveyances to the stockholders in March, 1882.

That said construction of said Smith's testimony is a complete surprise to your petitioner and to its counsel for the reason that your petitioner and its counsel, up to the time of said intimation, had regarded and believed said Smith's testimony, taken as a whole, to show clearly that there was not, at the time of the agreement for said reconveyances or at any time before or thereafter, any surrender

or release whatsoever of the right of your petitioner to follow said lands or the proceeds thereof as a creditor of said Lumber Company, by reason whereof, and there being no other proof in the record herein tending to establish the contrary, your petitioner deemed it unnecessary to corroborate the testimony of its said cashier upon that point.

Your petitioner further shows that it can procure and show by the testimony of Samuel Atlee, W. H. Kretsinger, and Charles Brewster, all stockholders in said Lumber Company, and the Hon. Joseph M. Beck, one of the justices of the supreme court of Iowa and
163 the trustee to whom said lands were originally conveyed, and all of whom were present at the meeting at which said reconveyances were agreed upon, that the lands were reconveyed to the stockholders, including said Waterman, without any relinquishment of the right of your petitioner, as a creditor of the Lumber Company, to follow said lands or the proceeds thereof, and that said reconveyances were in no way to jeopardize or impair the lien of your petitioner upon said lands in case of any deficiency in the funds of W. R. Sill, the receiver of the Lumber Company.

Your petitioner further says, as further ground for this its petition for rehearing, that the purchase-money mortgage remaining upon the lands conveyed by Joseph A. Smith, Samuel Atlee, J. C. Atlee, Charles Brewster, and W. H. Kretsinger to Joseph M. Beck, as trustee, was discharged by said parties to the extent of eighteen thousand dollars in June, 1880, and that notes of the Black River Lumber Company, dated June 26th, 1880, for an aggregate amount of eighteen thousand dollars ($18,000) were thereupon delivered to said parties; that no judgment against said company was taken upon said notes; that said notes are now held by your petitioner; that said notes were not included in the amount stated in your petitioner's bill of complaint to be now due from the Lumber Company to your petitioner, for the reason that upon the reconveyance of the said lands to the original contributors thereof said notes ceased, as your petitioner believes, to be a valid claim in equity against said Lumber Company; that your petitioner is informed that respondents in this case now interpose a claim of $31,163.18 alleged to have been paid by said Waterman in discharge of a judgment in favor of Milo Smith as a set-off to a portion of the claim of your petitioner; that said judgment was entered upon notes given by said Lumber Company for money advanced by said Waterman to pay purchase-money secured by mortgage upon the lands
164 conveyed by Ketcham and Waterman to said trustee, and is therefore in equity no more entitled to be considered a valid claim against said Lumber Company than said notes now held by your petitioner; that said Lumber Company has never paid any portion of the money advanced by the parties aforesaid to take up said purchase-money notes.

Your petitioner therefore prays this court to grant a rehearing in this case upon the issues herein mentioned, and that your petitioner be permitted to establish the facts hereinbefore stated in such manner and on such terms as this court may direct, and that your peti-

tioner may be permitted to file its supplemental or amended bill in this case alleging the facts above mentioned, and that your petitioner have such other and further relief in the premises as shall seem meet.

BANK OF FORT MADISON,
By CHARLES BREWSTER, *P't.*

THEODORE SHELDON,
Solicitor for Petitioner.
THOMAS D. JONES, *of Counsel.*

STATE OF IOWA, }
County of Lee, } *ss:*

Charles Brewster and Joseph A. Smith make oath and say that they are, respectively, president and cashier of the petitioner, Bank of Fort Madison; that they have read the foregoing petition; that the allegations therein contained are true to the best of their knowledge, information, and belief.

CHARLES BREWSTER.
JOSEPH A. SMITH.

Subscribed and sworn to before me this 14th day of June, 1887.
[SEAL.] J. D. M. HAMILTON,
Notary Public.

165 Circuit Court of the United States, Northern District of Illinois. In Equity.

BANK OF FORT MADISON
against
PHILANDER M. ALDEN *et al.*, Executors of the Estate of James S. Waterman, Deceased.

STATE OF IOWA, *County of Lee:*

Samuel Atlee makes oath and says that he was a stockholder in the Black River Lumber Company; that he was present at the meeting of the stockholders of said company at Fort Madison, Iowa, in March, 1882, at which meeting it was determined that the lands held in trust by Joseph M. Beck for said company should be reconveyed to the original contributors thereof; that at the time of said meeting it was known to affiant and to the other stockholders there present that the claim of the Bank of Fort Madison against the Lumber Company for a large amount was unsettled; that at said meeting both Milo Smith and James S. Waterman asserted that the logs then in the hands of the receiver would be abundant to discharge all the debts of the said company, including the said claim of the Bank of Fort Madison; that no adjustment or settlement of any kind of the said claim of the said bank against said Lumber Company was had at said meeting; that neither said bank nor its officers nor stockholders agreed to look to the fund in the hands of the receiver to discharge its said claim, nor agreed to relinquish

its right to proceed against said lands or the proceeds thereof
166 in the hands of the stockholders for the payment of any deficit remaining unpaid after exhausting the funds in the hands of the receiver, and that affiant understood that the lands then agreed to be reconveyed to the stockholders or the proceeds of the sale of such lands should remain subject to the payment of any deficiency which might occur.

Affiant further says he is not interested in any way in said Bank of Fort Madison.

SAMUEL ATLEE.

Subscribed and sworn to before me this 14th day of June A. D. 1887.

[SEAL.] J. D. M. HAMILTON,
Notary Public.

STATE OF IOWA, *County of Lee:*

W. H. Kretsinger, makes oath and says that he was one of the stockholders of the Black River Lumber Company; that he was present at the meeting mentioned in the foregoing affidavit of Samuel Atlee; that each and all of the facts stated in said affidavit are true, and that this affiant understood at said meeting and has ever since understood that the lands then agreed to be reconveyed to the stockholders or the proceeds of the sale of such lands should remain subject to the payment of any deficiency which might occur.

Affiant further says he is not interested in any way in said Bank of Fort Madison.

W. H. KRETSINGER.

Subscribed and sworn to before me this 14th day of June, A. D. 1887.

[SEAL.] J. D. M. HAMILTON,
Notary Public.

167 STATE OF IOWA, } ss:
County of Lee, }

Charles Brewster makes oath and says that he was one of the stockholders of the Black River Lumber Company and is a stockholder in the Bank of Fort Madison; that he was present at the meeting of the stockholders of the Black River Lumber Company mentioned in the foregoing affidavit of Samuel Atlee; that each and all of the facts stated in said affidavit are true, and that affiant understood that the lands then agreed to be reconveyed to the stockholders or the proceeds of the sale of such lands should be subject to the payment of any deficiency which might occur.

CHARLES BREWSTER.

Subscribed and sworn to before me this 14th day of June, A. D. 1887.

[SEAL.] J. D. M. HAMILTON,
Notary Public.

STATE OF IOWA, *County of Lee:*

Joseph A. Smith, on oath, says he is the Joseph A. Smith who has testified in this cause on behalf of complainant; that in his said testimony and on cross-examination he stated that the title to the lands reconveyed in March, 1882, to the stockholders of the Black River Lumber Company was to be good; that in making that statement this affiant meant to state that said title was to be good in that the same was to be free from the lien of the judgment of Milo Smith,
168 which said judgment and its release was under discussion at the time this affiant made the foregoing statement as to the title; that in stating said title was to be good this affiant did not mean nor intend to state that the same was to be free from the right of the bank to follow said lands as a creditor of said Lumber Company, and that, in point of fact, there was, at said settlement, no release or relinquishment whatsoever of the right of said bank to follow said lands as such creditor.

Affiant further says that as soon as it appeared after said reconveyances were made that the funds in the hands of W. R. Sill, the receiver of said Lumber Company, were insufficient to satisfy in full the indebtedness of the Lumber Company due it, the said Bank of Fort Madison requested said receiver to collect and make good the unsatisfied balance of said indebtedness out of the lands of the Lumber Company, whereupon said receiver replied that he never had had any right or control over any lands of the Lumber Company and was therefore without power to enforce the payment of said balance out of any lands of the Lumber Company.

Affiant further says that he has read the foregoing affidavit of Samuel Atlee; that he was present at the meeting of the stockholders of the Black River Lumber Company mentioned in the said affidavit; that each and all of the facts stated in said affidavit are true, and that affiant understood that the lands at said meeting agreed to be reconveyed to the stockholders or the proceeds of the sale of such lands should be subject to the payment of any deficiency which might occur in the funds of said receiver to satisfy in full the indebtedness to be found due the Bank of Fort Madison.

JOSEPH A. SMITH.

Subscribed and sworn to before me this 14th day of June, A. D. 1887.

[SEAL.] J. D. M. HAMILTON,
Notary Public.

169 STATE OF IOWA, } *ss:*
Polk County, }

Joseph M. Beck, being duly sworn, on his oath says that he is the identical person to whom certain lands in the State of Wisconsin were conveyed by James S. Waterman, Samuel Atlee, & others to be held in trust, & which were subsequently conveyed by him to the Black River Lumber Company. These lands are referred to or involved in an action by the Bank of Fort Madison *vs.* Philander M.

Alden *et al.*, ex'rs, in the U. S. circuit court for the northern district of Illinois, as is shown by what purports to be an abstract of the record in said case presented to affiant.

He further says that he was present at frequent interviews & consultations had at Fort Madison in March, 1882, by the parties interested in said lands & said Black River Lumber Company for the purpose of consummating a settlement of their affairs & interests involved therein; he became & was familiar with the purposes & objects of the parties concerned in making the settlement & arrangement, and well knew the interests each had in the property involved.

Affiant further declares that there was no agreement, understanding, or expressed purpose on the part of any of the persons concerned to release or relieve the Black River Lumber Company of liability upon a debt owed by it to the Bank of Fort Madison, nor to discharge any claim or right which said bank held to pursue its remedy against the property of the Black River Lumber Company or against the stockholders thereof. There was no proposition or request made by any one to that effect, and no one claimed that it ought to be done in making the final settlement.

170 Affiant further says that all of the parties to the settlement & arrangement expressed or concurred in the opinion and belief that the assets of the Black River Lumber Company there in the hands of its receiver, consisting mainly, if not wholly, of logs cut from the lands there in Black river or its tributaries, — worth of sufficient value to pay all the indebtedness of the company and have a large surplus for distribution to the persons entitled thereto. This opinion & belief was frequently expressed by James S. Waterman, & no doubt or question thereof was expressed by any one. It was a matter of frequent conversation, and so fully was affiant impressed with belief of the correctness of these opinions that he afterwards heard with astonishment that the assets of the company were insufficient to pay its debts.

Affiant says that he is not interested in any manner, directly or indirectly, in the matters referred to in his affidavit.

JOSEPH M. BECK.

Subscribed and sworn to before me, clerk of the supreme court of Iowa, the 15th day of June, 1887. Witness my hand and the seal of said court.

[SEAL.] G. B. PRAY,
Clerk Supreme C't, Iowa.

171 STATE OF ILLINOIS, *County of Cook:*

Theodore Sheldon and Thomas D. Jones, being duly sworn, on oath say that they are solicitors and counsel for the Bank of Fort Madison, complainant in this cause; that by the intimation of the Court that the testimony of Joseph A. Smith indicated a relinquishment of the right of the complainant, as a creditor of the Black River Lumber Company, to follow the lands reconveyed to James S. Waterman or the proceeds thereof, these affiants were taken by sur-

prise; that these affiants were of opinion, up to the time of such intimation, that the testimony of said Smith, taken as a whole, showed there was no relinquishment of said right, by reason whereof, and there being no testimony to the contrary introduced by the defendants, no further proof was introduced; that since said intimation affiants have procured and here present the affidavits of Samuel Atlee, W. H. Kretsinger, Charles Brewster, Joseph A. Smith, and Joseph M. Beck, the facts shown in which affidavits are, in the opinion of the affiants, material to the chief issue in this cause.

THEODORE SHELDON.
THOMAS D. JONES.

Subscribed and sworn to before me this 10th day of June, A. D. 1887.

[SEAL.] RICHARD B. TWISS,
Notary Public.

Endorsed: Filed June 16, 1887. Wm. H. Bradley, clerk.

172 And the defendants thereupon filed the affidavit of D. J. Carnes, as follows:

Affidavit.

STATE OF ILLINOIS, } *ss:*
Cook County, }

United States Circuit Court, Northern District of Illinois.

BANK OF FORT MADISON *vs.* PHILANDER M. ALDEN *et al.*

D. J. Carnes, being duly sworn, on oath says that he resides in Sycamore, De Kalb county, State of Illinois, and is the general attorney for the estate of James S. Waterman, deceased, of which the defendants herein, said Alden and Robinson, are the executors and trustees; that he has examined the record book in which are contained the minutes of the directors' and stockholders' meetings of the Black River Lumber Company, which is the same company described in the bill of complaint herein; that he finds from the said record book that at a meeting of the stockholders of the Black River Lumber Company, held at the office of Cameron & Losey, at La Crosse, Wisconsin, April 20, 1881, at 10 a. m., there were present John C. Atlee, who also held a proxy from Samuel Atlee; Charles Brewster, who also held the proxy of Joseph A. Smith; Welcome Hyde, H. & M. M. Ketchum; S. Kretzinger, with a proxy from W. H. Kretzinger, and Ida H. Ketchum, by her proxy—said persons representing all the 4,375 shares of the stock of the said company; that at said meeting the following resolutions were offered by the said Charles Brewster:

173 "Resolved, That in the opinion of the stockholders of the Black River Lumber Company, represented in this meeting and voting thereon, it is expedient and for the best interests of the stockholders and creditors of said company that a division of the

lands of the company should be had and the same redeeded to the several parties entitled thereto, as shown by the stock representing the interest of the several parties now therein or to whom they may direct.

"That to that end we hereby submit the question of such division to George W. Cate, of Stevens' Point, and J. W. Losey, of La Crosse, Wisconsin, to report to the stockholders or directors of this company, as necessity requires, a plan for such division, which plan, if agreed on and so reported by said Cate and Losey, we agree to adopt and ratify."

That it further appears from said records that Mr. John C. Atlee moved the adoption of said resolutions, and all voted aye except Welcome Hyde.

Affiant further says that he finds from the said records that on April 27, 1881, the same stockholders met at the International Hotel, La Crosse, Wisconsin, and unanimously adopted the following resolutions:

"Whereas the business of the Black River Lumber Company has been suspended for several months, arising from causes within said company, and it is the intention of said company to abandon its organization as soon as practicable, and the said company does not intend to further prosecute the business for which it was organized, and it is desirable that the lands of the corporation shall be conveyed to the persons who conveyed the same to the company or to the persons representing such former owners: Therefore,

174 "Resolved, That Hon. J. M. Beck, trustee of said lands for this corporation, be, and he hereby is, directed to convey to J. C. Atlee, Samuel Atlee, W. H. Kretzinger, Charles Brewster, and Joseph A. Smith all the lands conveyed by them to said Beck in trust for said corporation by deeds bearing date the 19th day of October, 1879, and recorded in the office of the registrar of deeds in the counties of Clarke, Jackson, and Wood.

"That said J. M. Beck be directed and instructed to convey to A. E. Blutman, as trustee, all the lands conveyed to the said Beck in trust for this corporation by Henry Ketchum and James S. Waterman by deed dated October 17, 1879, and recorded in the office of the registrar of deeds of Wood, Jackson, and Clarke counties."

Affiant also finds in said book of records that the board of directors of the said Black River Lumber Company met at the International Hotel, La Crosse, Wisconsin, on April 27, 1881, at which meeting were present H. Ketchum and J. C. Atlee, Welcome Hyde and M. M. Ketchum, at which meeting a resolution was unanimously adopted, which, after reciting the resolutions of the stockholders, passed on the same day and above herein set forth, proceeds as follows:

"Now, therefore, be it resolved, That the foregoing resolution of the said stockholders be, and the same is, adopted and approved."

Affiant further says that he finds from said record book that on November 19, 1881, a directors' meeting of the said Black River Lumber Company was held at the International Hotel, La Crosse, Wisconsin, at which were present H. Ketchum, Welcome Hyde, and

M. M. Ketchum, at which meeting a preamble and resolution
175 were unanimously adopted, wherein, after reciting the resolution of April 27, 1881, as above set forth, and that no conveyances had been made by the said trustee as therein directed, he, the said trustee, was directed and instructed "to deed to J. S. Waterman absolutely all the lands deeded by Henry Ketchum and J. S. Waterman to him as trustee for the Black River Lumber Company, by deed dated October 19th, 1879," and by said resolution the said trustee was again directed and instructed to reconvey to J. C. Atlee, Samuel Atlee, W. H. Kretzinger, Charles Brewster, and Joseph A. Smith, according to the resolution of April 27th.

Affiant says that he finds from said book of records that on April 14, 1882, the board of directors of said Black River Lumber Company met at the bank of Fort Madison, in Fort Madison, Iowa, and at said meeting, on motion of J. C. Atlee, a resolution was read and adopted which recited that the stockholders of the said corporation unanimously voted on April 27, 1881, to instruct the said trustee to convey to J. C. Atlee, Samuel Atlee, W. H. Kretzinger, Charles Brewster, and Joseph A. Smith the lands deeded by them, etc., and also instructed said trustee to convey to J. E. Buttman as trustee all the lands conveyed to Beck as trustee by Henry Ketchum and James S. Waterman; and the said resolution also recited that on November 19, 1881, the board of directors of said company instructed the said Beck, as trustee, to convey to James S. Waterman, all the lands conveyed to said Beck by Henry Ketchum and J. S. Waterman, and also recited that no action had been taken by said Beck in pursuance of said resolutions, and that it appeared that said Beck
had no authority to convey said lands to any other than the
176 said Black River Lumber Company, for whom the same were held in trust; therefore, in pursuance of said recitals, it was resolved that the said J. M. Beck be and he was duly requested, directed, and authorized to convey all the lands held by him as trustee to the said Black River Lumber Company, that the lands might be disposed of as directed by said stockholders and directors, and it was in said resolution duly resolved as follows: "That the president and secretary of the company be, and they are hereby, duly authorized and empowered to convey, by good and sufficient deed, under the seal of this company, to J. C. Atlee, Samuel Atlee, Charles Brewster, and Joseph A. Smith all the lands conveyed by them and W. H. Kretzinger to said Beck as trustee aforesaid."

"Resolved, That the president and secretary of the company be, and they are hereby, duly authorized and empowered to convey, by good and sufficient deed, under the seal of this company, to James S. Waterman all the lands conveyed by Henry Ketchum and James S. Waterman to said Beck as trustee aforesaid, said conveyance to be made in conformity with the resolutions of the stockholders and directors of this company."

Affiant further says that the parts above set forth purporting to represent the language of the said resolutions, and in quotations, are correct copies of such portions of said resolutions from the said record book, and that the recitals, dates, and other particulars, the

substance only of which purports to be stated above, are correctly stated as they appear in said record book.

D. J. CARNES.

Subscribed and sworn to before me this 22d day of June, A. D. 1887.

[SEAL.] GILBERT H. DENTON,
Notary Public.

177 Whereupon the court thereafter, to wit, on June 20th, 1887, declined to grant the prayer of said petition.

The above and foregoing was all the testimony adduced in said cause.

Afterwards, to wit, August 8th, 1887, the court entered a decree, of record herein, dismissing the complainant's bill for want of equity, from which the complainant then and there prayed an appeal to the Supreme Court of the United States.

Whereupon the same was allowed upon filing a bond within sixty days in the sum of five hundred dollars, and leave was given to make certificate of evidence within the same time.

And, because none of said proceedings appear of record herein, the complainant asks that the above and foregoing certificate of evidence may be signed, sealed, and enrolled, and it is done accordingly.

W. Q. GRESHAM.

Endorsed: Filed Sep. 1, 1887. Wm. H. Bradley, clerk.

178 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein the Bank of Fort Madison is the complainant and Philander M. Alden and George S. Robinson, executors of the estate of James S. Waterman, deceased, are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this tenth day of October, 1887.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY, *Clerk.*

Endorsed on cover: N. Illinois C. C. U. S. No. 1226. The Bank of Fort Madison, appellant, *vs.* Philander M. Alden and George S. Robinson, executors of James S. Waterman, deceased. Filed October 14, 1887.

Office Supreme Court U. S.
FILED.
JAN 2 1889
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM A. D. 1888.

THE BANK OF FORT MADISON, *Appellant,*
vs.
PHILANDER M. ALDEN ET AL., *Appellees.*

Appeal from the Northern District of Illinois. In Equity.

APPELLANT'S STATEMENT AND BRIEF.

THEODORE SHELDON,
SOLICITOR FOR APPELLANT.

HENRY STRONG,
OF COUNSEL.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM A. D. 1888.

THE BANK OF FORT MADISON, *Appellant*,
vs.
PHILANDER M. ALDEN ET AL., *Appellees.*

Appeal from the Northern District of Illinois. In Equity.

STATEMENT.

This is a suit brought by appellant, the Bank of Fort Madison, a corporation organized under the laws of Iowa, against Philander M. Alden and George S. Robinson, as executors of the will of James S. Waterman, deceased, late of Sycamore, Illinois. Appellant is a creditor—the only unpaid creditor—of a defunct Wisconsin corporation, the Black River Lumber company, in the sum of $58,505.53, with interest since January, 1884. The late James S. Waterman was a stockholder in the Black River Lumber company. After the debt to appellant was contracted, the stockholders of the Black River Lumber company distributed among themselves the

larger part of the assets of the company, thereby making it insolvent. The said Waterman obtained four-sevenths of the assets so distributed, without any compensation to the company therefor, sold such assets and appropriated the proceeds to his own use. Appellant now seeks to hold the estate of Waterman liable for the payment of its claim, to the extent of the assets so appropriated. A portion of its claim is also further evidenced by a promissory note of the lumber company, endorsed by the firm of which Waterman was a member.

The facts of the case are as follows:

On the 17th day of October, 1879, Charles Brewster, Joseph A. Smith, William A. Kretzinger, Samuel Atlee and J. C. Atlee, all residing then and now at Fort Madison, Iowa, owned a tract of pine land, containing 13,000 acres, lying in Clark, Jackson and Wood counties, Wisconsin. At the same time Henry Ketchum and M. M. Ketchum, both of Wisconsin, and the said James S. Waterman, then composing the firm of Ketchum & Waterman owned another tract of land containing 30,000 acres of pine lands lying in Clark and Jackson counties in the same state, all of which last named tract was subject to a purchase money mortgage for $75,000. On that date, the parties above named entered into the following agreement (Rec., 76–78):

"ARTICLES OF AGREEMENT made and entered into this 17th day of October, A. D. 1879, between Charles Brewster, Joseph A. Smith, William A. Kretzinger, Samuel Atlee and J. C. Atlee of Fort Madison, Iowa, parties of the first part, and Henry Ketchum of New London, Wisconsin, M. M. Ketchum of La Crosse, Wisconsin, and James S. Waterman of Sycamore, Illinois, parties of the second part:

"WHEREAS, the above parties have mutually agreed

to organize a corporation under the laws of the State of Wisconsin to be designated as the 'Black River Lumber Company,' for the manufacture and sale of lumber, logs and timber, and such other business as may be included in the charter of incorporation;

"NOW THEREFORE, said parties of the first part agree to contribute and convey to a trustee or trustees for the benefit of such company, under certain restrictions agreed upon, a tract of pine land containing about thirteen thousand acres lying in Clark, Jackson and Wood counties in the State of Wisconsin, lately purchased by said parties from Welcome Hyde, and more fully described by deed on record in said counties, for the sum of $75,000.00, and the said parties of the second part agree to contribute and convey to a trustee or trustees for the benefit of such company, under certain restrictions agreed upon, the *east twenty-five thousand* acres of pine lands lately purchased of the Chicago, St. Paul and Minneapolis Railroad Company, being in the counties of Clark and Jackson, in the State of Wisconsin, and more fully described by deeds on record in said counties, for the sum of $100,000.

"AND WHEREAS, there remains unpaid a portion of the purchase money on each of said tracts;

"NOW, THEREFORE, it is agreed that said company shall assume and pay all such deferred payments as they mature, but the parties of the second part are to advance the funds and take up the said purchase money notes, aggregating $25,000, and interest due on said notes and other deferred payments on their purchase on or about December 1, A. D. 1879, and thereupon the said company shall execute its note or notes for $27,260.42, payable on or before July 1, 1880, with eight per cent. per annum interest, and the parties advancing said funds shall hold the notes taken up with the security as a lien on the premises until said company's note is paid, and the first funds arising out of the business after paying of the current expenses of operating the said business, shall be applied to the payment of the note or notes of said company last aforesaid. The parties of the first part agreee to advance from time to time, as the company may require it, funds in the ag-

gregate amounting to three-quarters of the sum of $27,-260.42, at eight per cent. per annum interest, to be used in carrying on the business of the company, and the balance of funds necessary are to be furnished by the company, except that the parties of the first part agree to advance to said company an amount equal to three-fourths of what said parties of the second part have advanced on logs which are to be gotten out this coming winter.

"Said Henry Ketchum is hereby appointed and constituted agent of the parties hereto to make all needed arrangements and contracts, and do whatever is necessary to be done in furtherance of the business in preparing and furnishing said logs for market, and with power to act until such time as said parties shall complete their organization as corporation aforesaid, which shall be effected by the first Monday in December, A. D. 1879.

"As to the moneys to be advanced by the parties of the first part, as aforesaid, the company, on such advancement, shall execute its note or notes therefor at three or six months, with interest at eight per cent. per annum.

"In case any party hereto shall pay or take up any portion of the indebtedness for the purchase price of said real estate, such party shall be entitled to the note of said company, with eight per cent. per annum, interest payable from time to time, as the business of the company will permit, or within six months from its date, at the election of the payee, and it is further agreed that there shall be no division of the profits among the stockholders of such company until its indebtedness aforesaid shall all be paid.

"It is further agreed that until said deferred payments for the purchase of said lands are made, that the timber taken from the same shall be, as nearly as practicable, taken from the tracts respectively conveyed by the parties of the first and second parts in proportion to their respective values aforesaid.

"It is further agreed that any party taking up any of the purchase money notes aforesaid shall retain the same, and the security therefor, which shall have the

same operation as a lien as it had in the hands of prior holder, until paid by the company.

"The stock of said company shall be taken by the parties hereto in the following proportions, that is to say: The parties of the first part are to have and own three-sevenths, and the parties of the second part four-sevenths, which said stock is to be received by them respectively in full payment for the aforesaid conveyances by them to such trustee, and each signer hereof shall receive stock in proportion to his individual interest in said lands.

"In witness whereof, the said parties have herennto signed, sealed and delivered the foregoing instrument this 17th day of October, A. D. 1879."

The "Black River Lumber Company" was thereupon incorporated under the laws of Wisconsin. The capital stock of the company was fixed at $437,500, divided into 4,375 shares of $100 each; and the shares were issued to the parties to the above agreement as follows:

James S. Waterman	1,250	shares,	$125,000
H. Ketchum	625	"	62,500
M. M. Ketchum	625	"	62,500
J. C. Atlee	468	"	46,800
S. Atlee	469	"	46,900
Charles Brewster	235	"	23,500
W. H. Kretzinger	468	"	46,800
Joseph A. Smith	235	"	23,500
	4,375		$437,500

Thus James S. Waterman and the two Ketchums, who were then, and continued to be until April, 1880, partners in the logging business under the name of Ketchum & Waterman, became possessed of four-sevenths of the shares representing $250,000 face value, and the other parties, whom we shall for brevity hereafter designate collectively

as the Iowa parties, became possessed of three-sevenths of the shares, representing $187,500 face value. No money was paid by either of the parties for the stock. The only contribution which Waterman and the two Ketchums made to the capital stock of the company, was a conveyance of the tract of pine land described in the contract above set out, to Joseph M. Beck, of Fort Madison, Iowa, in trust for the company upon certain conditions hereafter mentioned. It was stated in the above recited contract that this tract of land was the east 25,000 of the 30,000 acres which had been lately purchased for $100,000, and though there is some conflict of testimony as to the real value of this land, the preponderance of testimony goes to show that it was worth in November, 1879, when conveyed to Joseph M. Beck, not more than $179,500. The remaining 5,000 acres were retained by the firm. The only contribution which the Iowa parties made to the company for their shares of stock was a conveyance of the tract of pine land described in the above contract as belonging to them, to Joseph M. Beck, as trustee for the company, under conditions hereinafter mentioned. The value of this latter tract of land bore about the same ratio to the face value of the shares issued to the contributors thereof as the value of the Ketchum and Waterman tract bore to the face value of the shares issued to them.

The conditions upon which these lands were conveyed to Joseph M. Beck as trustee for the Black River Lumber company and by the performance of which the Black River Lumber company was to become entitled to a conveyance of the lands to itself, are best expressed in the terms of the deed from Ketchum & Waterman to Joseph M. Beck (Rec., 55):

"And it is now understood that there is now unpaid purchase money to become due upon the said lands to the sum and amount of seventy-five thousand dollars, besides accruing interest thereon, and which is, and which remains, a lien for the purchase money upon the whole thereof, and which amount the parties of the first part are liable for the payment thereof. And that, by a certain contract in writing, entered into and executed by and between Charles Brewster, W. H. Kretzinger, Samuel Atlee, J. C. Atlee, Joseph A. Smith, J. S. Waterman, Henry Ketchum and M. M. Ketchum, by the terms of which the said Henry Ketchum and James S. Waterman were to convey to said party of the second part, as trustee and for the benefit of said 'Black River Lumber Company,' the said Black River Lumber Company to issue to said Henry Ketchum and James S. Waterman, in such proportions as they may designate, two thousand five hundred shares of the capital stock of said corporation, of the sum of one hundred dollars each in consideration therefor, and to pay the said unpaid purchase money for said lands, according to the terms of said contract, and which contract bears date the seventeenth day of October, 1879, and which is referred to and made a part of the conditions of this deed, and a copy of which is to be delivered to the said party of the second part with this deed. And it is covenanted and agreed, and a condition of this trust, that as soon as the said purchase money now remaining unpaid, with the interest and to accrue thereon shall have been paid, according to the terms and conditions of said contract or otherwise, and the further condition that the corporation shall pay all the taxes to be assessed on said lands as required by law, then the said party of the second part, or the said George W. Cate, shall be and become such trustee as aforesaid, at the time required as such trustee forthwith, on demand, thereafter release and convey the lands hereby conveyed to him to the said Black River Lumber Company, in fee, absolute, according to the terms and conditions above written, and of the said contract aforesaid." (Rec., 55.)

The conditions of the deed from the Iowa parties to Joseph M. Beck, are the same as those above quoted.

It thus appears that out of the $100,000 for which the entire Ketchum & Waterman tract had been "lately purchased" by them, $75,000 was unpaid, was a lien upon the land, and the payment of it was assumed by the Black River Lumber company. The actual outlay of Ketchum & Waterman upon all their land was therefore only $25,000, and for this outlay they received shares of stock of the Black River Lumber Company of the face value of $250,000. Assuming the actual cash value of the land when conveyed to Beck to have been about $179,500, as above stated, its value as assets of the corporation was diminished by the amount of the encumbrance ($75,000), leaving an actual cash value of only $104,500.

The tract of land contributed by the Iowa parties was likewise encumbered, for unpaid purchase money, to about the same extent, proportional to its value, as the Ketchum & Waterman tract, and this encumbrance the Black River Lumber Company likewise assumed.

It appears from the preliminary contract above quoted (page 2, *supra*) that $25,000 of the encumbrance upon the Ketchum & Waterman tract was to fall due about December 1, 1879. By that agreement Ketchum & Waterman bound themselves "to advance the funds and "take up the said purchase money notes, aggregating "$25,000, and interest due on said notes, and other de- "ferred payments on their purchase on or about Decem- "ber 1, A. D. 1879, and thereupon the said company "shall execute its note or notes for $27,260.42, payable "on or before July 1, 1880, with eight per cent. per an- "num interest, and the parties advancing said funds shall "hold the notes taken up, with security, as a lien on the "premises, until said company's note is paid, and the

"first funds arising out of the business after paying of "the current expenses of operating the said business, "shall be applied to the payment of the note or notes "of said company last aforesaid."

As no money had been contributed to the capital stock of the company, it had no money wherewith to begin its logging operations. Partial provision for immediate funds was, therefore, made as follows:

"The parties of the first part (the Iowa parties) agree "to advance from time to time, as the company may require "it, funds in the aggregate amounting to three-quarters "of the sum of $27,260.42, at eight per cent. per annum "interest, to be used in carrying on the business of the "company, and the balance of funds necessary are to be "furnished by the company, except that the parties of the "first part agree to advance to said company an amount "equal to three-fourths of what said parties of the sec- "ond part have advanced on logs which are to be gotten "out this coming winter.

"As to the moneys to be advanced by the parties of "the first part as aforesaid, the company on such ad- "vancement shall execute its note or notes therefor at "three or six months, with interest at eight per cent. per "annum."

The Black River Lumber Company began its logging operations upon the lands held by the trustee for its use early in November, 1879. The money which the Iowa parties had agreed to loan (three-fourths of $27,260.42 or $20,445.30), had been loaned to the company by the complainant in this case, the Bank of Fort Madison, upon the endorsement of the various Iowa parties. When this sum was exhausted, the Black River Lumber Company continued to borrow money from appellant upon

the endorsement of various stockholders of the Black River Lumber Company, until toward the end of March, 1880, by which time the loans so made amounted to about $65,000. Of this amount $10,000 had been advanced upon a promissory note of the lumber company, bearing the endorsement of the firm of Ketchum & Waterman. The bank would not make the advance without such endorsement. This endorsement was thereupon made by Ketchum, and his authority to bind the firm is one of the questions now contested. Appellant then refused to advance any more money to the company without additional security to cover advances already made, as well as other advances to be made. On the 29th day of March, 1880, a chattel mortgage (Rec., 65–67), was executed by the Black River Lumber company to appellant, covering all its logs and lumber, to secure the payment of the above mentioned advances and of advances to be made by appellant as well as all other debts of the Black River Lumber company. Appellant took immediate possession of the property so mortgaged, and made further advances to the company, amounting to $20-000. No question is now raised as to the amounts actually loaned by appellant to the company, nor as to the actual application of the money by the company to its regular logging business.

On the 8th of April, 1880, H. Ketchum and M. M. Ketchum, stockholders, as before stated, in the Black River Lumber company, filed a bill (Rec., 57-76) in the Circuit court of LaCrosse county, Wisconsin, making appellant and the Black River Lumber company, and all the stockholders of that company, except Waterman, parties defendant. The bill alleged, in brief, that the chattel mortgage was a fraud upon the Black River Lum-

ber company; that certain of the directors who executed the chattel mortgage were conspiring to defraud the company; that the amount claimed by appellant was not due to it; that the company owed to complainants in said bill a large amount of money, and that the company had abundant assets to pay all its debts. The bill prayed that the mortgage or assignment be declared invalid, that the property of the company be restored to it, and that, pending the action, a receiver of the property be appointed; and that appellant be restrained from interfering with the property.

A stipulation (Rec., 158, 159) was thereupon entered into by all the parties to that suit, as follows:

"It is hereby stipulated by and between the parties hereto that William R. Sill, of LaCrosse, Wisconsin, may be appointed receiver of the property and effects of the Black River Lumber Company immediately by and on presentation of this stipulation to the Hon. A. W. Newman, judge of this court, and that in addition to the usual powers that the said receiver have full power to manage and control the said property, and sell and dispose of the same, in the usual and customary course of the trade, for cash or on credit, as may appear to be for the best interests of the parties interested, and apply the proceeds of such property to the payment of the debts of said Black River Lumber company, in such order of preference as the court shall direct; and as soon and whenever such debts shall all be paid, the said receiver shall be discharged, and so much of said property as may be undisposed of shall be returned to said Black River Lumber company. And it is further agreed that the said receiver give security for the faithful discharge of said trust in the sum of twenty-five thousand dollars, with sureties, to be approved by the judge of this court; and as soon as the receiver shall be appointed, and the security approved, the bill of sale now on file and any chattel mortgage heretofore executed to said Bank of Fort Madison shall be canceled.

But it is understood that any and all sums of money advanced by the Bank of Fort Madison, whether before or after the execution of said bill of sale or chattel mortgage, and in caring for or preservation of the property of, or in payment of, the debts of the said Black River Lumber company, shall be a charge against said company. And it is further agreed that as soon as the receiver is appointed and the security approved, the said M. M. Ketchum, as general manager of said Black River Lumber company, turn over and deliver to the said receiver all the property and effects of the said company in his hands as general manager."

An order of court was thereupon entered appointing a receiver in accordance with the stipulation. (Rec., 59, 60.)

Pending this litigation the first notes secured by purchase money mortgage on the Ketchum & Waterman tract, amounting as before stated (see Preliminary Contract, page 2 *supra*, Rec., 76) to $25,000 and interest, fell due; and Waterman appears to have advanced the money to take up these notes as was stipulated in the agreement. But instead of holding such notes with the security as a lien upon the premises until the notes could be paid out of the earnings of the company, as the contract provided (page 2, *supra*), Waterman appears to have caused judgment to be entered against the Black River Lumber Company for the amount of the notes in the name of one Milo Smith, who was then an agent of Waterman attending to Waterman's business at La Crosse. Lien was thus obtained upon all the property of the company (including the lands contributed by the Iowa parties) as security for notes which were originally a lien only upon the Ketchum & Waterman tracts.

By stipulation of all the parties, the receiver was au-

thorized to pay and did pay all claim against the Black River company except appellant's claim and the above-mentioned judgment in favor of Milo Smith.

In the month of April, 1882, after the adjustment of all claims as above stated, except the claim of appellant and that of Milo Smith, and while these two claims were still pending and undetermined, a meeting was had at Fort Madison, attended by all the stockholders of the Black River Lumber company, except the two Ketchums. There is but little controversy as to what was actually done at this meeting, but the main controversy in this case concerns the legal effect of what was there done. The lands contributed by the various stockholders were still held by the trustee. The receiver does not appear to have claimed any jurisdiction over these lands. He confined his operation to the logs already cut and lumber manufactured when he took possession, that is, to the property covered by the chattel mortgage in controversy. It was evident to all, that the Black River Lumber Company could not again be revived. It was therefore unanimously agreed by the stockholders then present, that the trustee should reconvey the lands to the respective stockholders who had conveyed the same to the trustee—except that the lands originally conveyed by Ketchum & Waterman (amounting to four seventh of the whole), should be conveyed by the trustee to Waterman alone. To this Ketchum consented (Stipulated Facts, Rec., 53, clause 8, Rec., 55). It was agreed that the judgment in favor of Milo Smith above mentioned, which had been entered upon notes given for purchase money of the Ketchum & Waterman tract alone, but which had become a lien upon the lands conveyed by the Iowa parties as well, should be released as to the lands conveyed by (and to be recon-

veyed by the trustee to) the Iowa parties, and should be collected only out of the lands to be reconveyed to Waterman. No disposition whatever was made of appellants claim.

The lands were thereupon reconveyed by Judge Beck, the trustee, to the Black River Lumber company, and simultaneously conveyed by the company to the parties who had originally conveyed them to the trustee, except that the 25,000 acres composing the Ketchum and Waterman tract was conveyed to Waterman. The Milo Smith judgment was released both as to the lands reconveyed to the Ft. Madison parties and as to the fund in the hands of the receiver. Appellant thus became the sole remaining unpaid creditor of the Black River Lumber company, and the sole claimant of the fund in the hands of the receiver. It appears to have been believed by all parties at the Ft. Madison meeting that enough would be realized from the property in the hands of the receiver to pay appellant's claim in full. As this property consisted of logs and lumber lying scattered over a large extent of territory, accurate estimate of its value was impossible. The Ft. Madison parties who lived at a distance from the scene of operations, claim to have been misled as to the value of that property, by unfounded assurances given to them by Ketchum, who had been manager of the Black River Lumber Company, and a partner of Waterman, by Waterman himself, and by Milo Smith, Waterman's agent at La Crosse. The record shows that within six months after the reconveyance to Waterman, he sold the tracts reconveyed to him for the sum of $267,750 (stipulated facts Rec., 53 clause 4). It is a stipulated fact (Rec., 53) that Waterman did not pay any of the debts of the lumber company except the Milo Smith judgment, which repre-

sented a portion of the purchase money mortgage on the Ketchum & Waterman tract. As the total encumbrance on the Ketchum & Waterman tract when it was conveyed to the trustee in 1879, was $75,000, that sum, together with interest thereon down to date of re-sale, deducted from the proceeds of such re-sale ($267,750) leaves the net proceeds of the sale of those lands to the amount of $192,750 in Waterman's hands, a sum nearly three times the amount of the indebtedness to the bank.

Appellant in this case, the Bank of Ft. Madison, did not, as a corporation, take any part in the matter of the reconveyances above mentioned. Two of the Iowa stockholders of the Black River Lumber company, Charles Brewster and Joseph A. Smith, then owned all of the stock of the Bank of Ft. Madison. The former was president, the latter the cashier of the bank. This fact gives rise to the main controversy in this case, namely: whether by virtue of the reconveyance of the lands, the bank lost its claim to follow the lands or the proceeds of the sale of them, regarded as equitable assets of the Black River Lumber company, in the hands of the executors of Waterman. It is not claimed by appellees that the bank, or any officer or stockholder of the bank assuming to act for it, expressly released or waived any rights which it then had against the Black River Lumber company, its property or its stockholders. The bearing, if any, of the proposed reconveyances upon the claim of the bank was not even mentioned in the course of the negotiations leading to such reconveyances. The only witnesses examined who were present at those negotiations were Joseph A. Smith and Milo Smith, who are the principal witnesses in this case.

Joseph A. Smith, testifying for complainants, says (Rec., 112):

"Q. Did the Bank of Fort Madison have any hand in "that settlement?

"A. No, sir; not the bank.

"Q. Was there any demand made upon the bank at "that time by any of these stockholders that the bank "should ratify that settlement and release its claim?

"A. No, sir.

"Q. Has the bank ever released its claim in any way?

"A. No, sir.

"Q. Was it a part of that settlement whereby these "lands were reconveyed that the bank should release its "claim?

"A. No, sir.

"Q. Was there any talk upon that subject?

"A. There was no talk on that subject, to my recollec- "tion now."

Milo Smith, testifying for appellees, and referring to the same transaction, is equally explicit (Rec., 139):

"Q. Was there anything said about the claim of the "bank of Fort Madison?

"A. Not that I know of at that time; I didn't hear "any discussion about it; *that didn't connect itself with* "*the transfer of the land.*

"Q. Did it connect itself with the release of the judg- "ment on your part?

"A. No, sir."

Mr. Waterman attempted at that meeting to obtain a release from the bank of the endorsement of Ketchum & Waterman upon the $10,000 note held by the bank, and constituting a portion of its claim against the Black River Lumber company as stated above. He had such a release drawn up, but the bank declined to execute it. (Rec., 141.) But of the claim of the bank against the

Black River Lumber company, no other mention appears to have been made at that or any other stockholders meeting.

That claim was then and for nearly two years afterwards pending in the Circuit court of the United States for the Western district of Wisconsin, awaiting the collection and sale by the receiver of the property under his control. Subsequently, on the 18th of January, 1884, final decree (Rec., 28-30) was entered in that suit, finding the amount then due to the Bank of Fort Madison to be $72,366.14, and directing the receiver to turn over to the bank certain property and credits, leaving the balance due to the bank $58,505.53. (Rec., 88.) By that decree the receiver was also discharged.

With the discharge of the receiver the last vestige of the Black River Lumber company disappeared, except perhaps as a mere capacity to re-organize. It has now no office or officers in Wisconsin, and no property of any kind anywhere, except the property which the stockholders distributed among themselves as already described, a portion of which appellant is now seeking to reach. Of the two Ketchums (the only stockholders who ever resided in Wisconsin) one is now dead (Rec., 113), and the other has removed to Minnesota (Rec., 113).

Appellant in this suit is not technically a judgment creditor of the Black River Lumber company. Its standing in equity depends upon the fact that the Black River Lumber company is now and has been ever since the termination of the Wisconsin suit practically non-existent.

James S. Waterman died on the 19th of July, 1883, and appellees were appointed his executors. (Rec., 5.)

On the 16th day of March, 1885, appellant filed its claim in the County court of DeKalb county, Illinois, against the estate of Waterman. (Rec., 3.) On petition of appellant the claim was subsequently removed to the Circuit court of the United States for the Northern district of Illinois. Final decree was entered in that court on the 8th day of August, 1887, dismissing the bill for want of equity, from which decree this appeal was on the same day prayed and granted. No opinion was delivered by the court below in disposing of the case.

Before proceeding to consider the legal bearings of the facts stated, we wish to say a word as to the relation of appellant to the grantees of the remaining three-sevenths of the lands formerly held by the trustee, that is, to the Iowa stockholders of the Black River Lumber company. William H. Kretzinger, Samuel Atlee and J. C. Atlee, have no connection whatever with appellant, beyond that of mere customers. The other two, Charles Brewster and Joseph A. Smith, are, as before stated, the holders of all the stock of appellant, the Bank of Fort Madison, and are respectively president and cashier of that bank. Brewster and Joseph A. Smith were the smallest stockholders of the Black River Lumber company, each holding only 235 shares, or about one-twentieth of the whole. A proportionate share of the lands held by the trustee was reconveyed to each of the Iowa stockholders, including Brewster and Joseph A. Smith; and appellant has, therefore, as valid a claim against them as against the appellees. Appellant is compelled to endeavor to collect the whole amount of its claim against the lumber company from appellees, and thus to require them to resort to an action against the Iowa stockholders for contribution. This is due to the fact that the Iowa

stockholders could not have been brought before the court in this suit without ousting the jurisdiction of the court, and thus a complete adjustment was impossible. This action against a single stockholder, as hereinafter shown, is fully authorized by the statutes of Wisconsin, (1878) § 1755.

The lands Waterman withdrew from the lumber company in the spring of 1882, were, during the summer of that year, sold by him to three different parties for the aggregate amount of $259,750. (Rec., 53.) From this amount he paid the purchase money mortgage for $75,000, amounting with interest to $93,163.18, leaving cash now in the hands of his executors, to the amount of $166,586.22

The indebtedness to the bank as adjudicated in the Wisconsin proceeding January 18, 1884, amounted to $72,366.14. (Rec., 28.) Upon that decree the receiver of the lumber company has paid in all $13,820.61, leaving still unpaid the sum of $58,505.53, and interest at six per cent. per annum since January 18, 1884. (Rec., 88.) Concerning the foregoing amounts there is no dispute.

The bank claims a decree against appellees for the above sum of $58,505.53, upon the ground that before payment of its debts, funds of the company largely in excess of that amount were withdrawn by Waterman, and are now in the hands of his executors. It also insists that there exists a separate and independent liability of the appellees for so much of the above sum as is represented by the note of the lumber company for $10,000 due June 25, 1880, with interest at eight per cent. per annum, which was endorsed by the firm of Ketchum & Waterman.

Assignment of Errors.

It is insisted by the bank that the court below erred,

1. In declining to charge the estate of Waterman with the sum of $58,505.53 and interest since January 18, 1884.

2. In failing to find the said estate liable upon the endorsement of the firm of Ketchum & Waterman upon the note for $10,000.

3. In refusing to permit appellant to take the testimony of Joseph M. Beck, Samuel Atlee, W. H. Kretsinger and Charles Brewster, as prayed in the petition for rehearing.

4. In dismissing appellant's bill of complaint for want of equity.

ARGUMENT.

The indebtedness of the Black River Lumber Company to appellant is found by the United States Circuit court for the Western district of Wisconsin, and it is not now disputed that the lands held by the trustee were valuable equitable assets of that company at the time this indebtedness was contracted. That these assets were distributed by the stockholders of the company among themselves, that by such distribution the company was rendered insolvent, that appellees are now in possession of four-sevenths of the proceeds of the sale of these assets—are equally undisputed facts and would seem to constitute a *prima facie* case for appellant.

The real points of contention developed in the court below are in the nature of defenses to the action, viz:

1. Whether appellant ought not to have pursued its remedy in the Wisconsin suit.

2. Whether appellant having no judgment against its debtor, has any standing in a court of equity.

3. Whether in legal effect affiant by virtue of the participation of Brewster and Joseph A. Smith in the matter of the re-conveyance of the lands must be held to have relinquished all right to proceed against the stockholders to whom the lands were re-conveyed, to satisfy any deficiency which might exist after exhausting the funds in the hands of the receiver.

4. Whether the court should have permitted appellant to take the additional testimony of Joseph M. Beck

and the other witnesses named in the petition for rehearing.

5. Whether the estate of Waterman is liable upon the endorsement of the firm of Ketchum & Waterman upon the draft for $10,000. This question is material only in case appellant is held to have no lien for the payment of its debt out of the proceeds of the sale of the lands.

These points we wish to consider briefly in the order mentioned.

I.

Was appellant bound to assert all its rights in the Wisconsin suit, and having failed to do so is it now precluded from further redress? The nature of that proceeding has already been stated. The bill upon which that suit was founded is in evidence in this case. (Rec., 57–74.)

Affiant was brought into that suit as a defendant to defend the validity of its chattel mortgage and its right to apply the property covered by that mortgage to the payment of its debt. The stipulation under which a receiver was appointed in that suit embraced the terms, "property and effects of the Black River Lumber company." (Rec., 158, 159.) Taken by themselves these terms might be taken to include all the property and effects of the Black River Lumber company, including its equitable interest in the lands held by the trustee. But the only "property and effects" which the lumber company had in its possession were the property and effects covered by the chattel mortgage, and that this was the meaning of the terms as used by the parties of the stipulation is best shown by the conduct of the parties themselves. The receiver confined his jurisdiction strictly to

the personal property in the possession of the company covered by the mortgage. He did not assume any jurisdiction over the lands. The stockholders too, who were all parties to this stipulation, except Waterman, who was not a party to the suit, assumed at the Fort Madison meeting, to distribute the lands among themselves without any reference whatever to the receiver. And the claim that the scope of the receivership included the equitable interest of the company in the lands, comes with bad grace from the executors of a man who took a conveyance of four-seventh of those lands and sold them again pending the receivership, and with no more reference to the receiver than if he had been non-existent. When the receiver was appointed there was no thought of winding up the affairs of the company in the mind of any one. The condition of defeasance of the chattel mortgage was that the lumber company should pay not only appellant's debts, but "all other debts and obligations contracted by the said Rlack River Lumber "company" (Rec., 66), hence the receiver was authorized by the stipulation and order of the court to pay all the debts of the company, but after the payment of these debts the receiver was to be "discharged and so "much of said property as may be undisposed of shall "be returned to said Black River Lumber company." (Rec., 158.) It is thus evident that the object and effect of the appointment of a receiver was simply to substitute the impartial custodianship of a disinterested person for the custodianship which appellant had assumed under its mortgage.

Such being the scope of this proceeding, if appellant had sought any affirmative relief in that proceeding beyond the satisfaction of its debt out of the property cov-

ered by its mortgage, it would have been compelled to file a cross-bill; but whether to file a cross-bill or to resort to an independent suit we take to be a matter within the discretion of the suitor. Before the termination of that proceeding, the bank had no means of knowing how much deficiency, if any there would be after exhausting the fund in the hand of the receiver. But when that proceeding was terminated and the deficiency ascertained, the lands had been conveyed to innocent third parties. Waterman, to whom four-sevenths of the lands had been conveyed, was then dead. He had not been a party to the suit, and had not been within the jurisdiction of the court pending the suit.

It thus appears clear to us that appellant was bound to do nothing more than defend the validity of its claim to the property mortgaged, which was all the property concerned in the litigation; and that, by reason of the limited character of the suit, the non-joinder and non-residence of the necessary parties, a complete determination of all the rights now in controversy was impossible in the Wisconsin suit.

II.

Has appellant any standing in this court as a simple contract creditor of the Black River Lumber company? We have no call or inclination to dispute the general rule that a creditor must have judgment against his debtor before he can successfully invoke the aid of a court of equity to reach equitable assets of the debtor. But the exception to that rule we deem equally well settled, that a court of equity does not require a creditor to obtain judgment against its debtor when it would be im-

possible to do so, or when it appears from the record that a judgment when obtained would be wholly nugatory and fruitless. The Black River Lumber company is and has been for several years a mere reminiscence. When appellant took possession of the property of the lumber company under the chattel mortgage in the month of March, 1880, the lumber company necessarily went out of business. One of the reasons assigned in the bill of complaint in the Wisconsin suit for the invalidity of that mortgage was "because it takes from the said corporation all its avail-"able means, and prevents it from transacting the busi-"ness for which it was organized, and thereby suspends "its business." (Rec., 71). It soon became evident to the stockholders of the lumber company that the business of the company so suspended could never be resumed. And when the stockholders met at Fort Madison in the spring of 1882, and formally resolved that the lands which constituted their contribution to the capital stock of the company, be reconveyed by the trustee to themselves, the enterprise was formally, definitely abandoned. With the reconveyance of the lands and the application by the receiver of the property in his hands to the payment of the debts of the company and the discharge of the receiver, the Black River Lumber company disappeared. Even supposing that valid service of process could be had upon a corporation which had ceased to have any office or officers or property of any kind within the state, which gave it existence, a judgment obtained against such a corporation would be a barren formality. "Its present status makes the reasons which apply to a "defunct corporation apply to this one." *Wellman et al.*, v. *Howland Coal and Iron Works*, 19 Fed. Rep. 51. *Wood* v. *Dummer*, 3 Mason, 308, decided by Justice

STORY, *Fiske* v. *Hills*, 11 Bissell 294, and *Bank of St. Mary* v. *St. John et al.*, 25 Ala., 566, are cases closely resembling the case at bar in many respects. In these cases a simple contract creditor was held entitled to relief in equity.

Under the ordinary rules of equity therefore, affiant claims standing in this court. But the right to sue in a court of equity without judgment is we think expressly given by the statutes of Wisconsin. Section 1,755 Rev. Stat. Wis. (1878) provides,

"Whenever the capital stock of any corporation shall "be diminished by any corporate vote, the stockholders, "thereof shall be liable for the payment of all debts then "remaining unpaid, in an action by any such creditor or "lawfully appointed receiver or assignee of such corpo- "ration, to an amount equal to the sum respectively re- "funded to them, or credited upon their debts for unpaid "stock, or both. And also the stockholders voting for "such diminution shall be jointly and severally liable to "any creditor whose debt shall then remain unpaid, to an "amount equal to the whole amount refunded to the "stockholders, or credited upon their debts for unpaid "stock, or both; but all stockholders shall be liable for "contribution to every stockholder compelled to dis- "charge corporate debts under this section proportionably "to the amount so refunded or credited to them respect- "ively."

This section, as we understand it, plainly gives a remedy in the alternative, either to the creditor or to a receiver or assignee. If there be no receiver or assignee, or if receiver or assignee has not exercised his right to proceed against the stockholder, then any creditor whose debt remains unpaid may proceed directly against such

stockholder. Thus in our view, even if appellant failed to bring itself within the exception to the rule above stated, that fact would not conclude appellant for the condition which the rule establishes as requisite to standing in court, namely, a judgment against its debtor, is dispensed with by this statute.

III.

Were the rights of the bank modified or impaired by the action of the stockholders of the lumber company in causing reconveyances of the lands to be made to the stockholders? It was strenuously insisted by counsel for appellees in the court below, that the arrangement made at the Ft. Madison meeting in April, 1882, was intended to accomplish a complete settlement of the affairs of the company and operated to release the lands and their proceeds from any claim the bank might establish against the Black River Lumber company. This result is supposed to follow not from any participation of the bank in that transaction, nor from any express release of the claim of the bank, for the bank did not participate in that transaction and Milo Smith, the principal witness for appellees, who was present at that meeting, admits that the claim of the bank "did not connect itself with the transfer of the land." (Rec., 139.) The result is deduced, rather as a conclusion of law, from the fact that Brewster and Joseph A. Smith, who participated in the transaction as stockholders of the lumber company, were at the same time respectively president and cashier of the bank, and owned all of the stock of the bank. In the view which we take of this question it is not necessary to go into the question as

to how far a corporation is affected by the acts of its officers or stockholders, when such officers or stockholders do not assume to act for the corporation.

It is true that in all the transactions of the bank with the lumber company and with the stockholders of the lumber company, the bank had invariably assumed to act as a corporation, and was treated by the lumber company and its stockholders as a corporation. The money had been advanced by it as a corporation; the chattel mortgage had been given to it as a corporation; it had been made a party to the Wisconsin suit by its corporate name; the claim was then pending before that court in its corporate name. As the parties had thus been in the habit of regarding and treating the bank as a corporation, if it were supposed by any of them that the bank was to be directly affected by the transaction, it might be reasonably expected that the bank would be called upon as a corporation to assent to the transaction. The meetings were ostensibly meetings of the stockholders of the Black River Lumber company, and as stockholders of such company, Brewster and Smith were present. There is not a shred of evidence to show that these men assumed to act in any other capacity than as stockholders of the Black River Lumber company.

But for the purposes of this discussion we might safely assume the entire acquiescence of the bank in the transaction. The claim which the bank now makes does not involve any repudiation of what was done at that meeting. We do not claim that the reconveyance of the lands was fraudulent either in intention or result. On the contrary it was a proper and highly advisable proceeding. The purpose for which the lands were originally conveyed to the trustee had become hopeless by reason of

dissension among the stockholders of the lumber company. Lands to the value of nearly a half million dollars were thus lying dead in the hands of the trustee. Taxes and interest upon the mortgages were running heavily against the lands, while no income was derivable from them to meet these charges.

The interest of Brewster and Joseph A. Smith in these lands (each about one twentieth), was very much less than the amount owed by the lumber company to the bank. The equitable lien of the bank upon all the lands held by the trustee was beyond question. The amount and value of the property held by the receiver was necessarily very uncertain. In view of these facts it would seem to require strong evidence to prove that two men with sufficient prudence to manage a solvent bank, would deliberately surrender their lien upon the lands which were by far the most valuable portion of the assets of the lumber company, and trust to making their debt out of an unknown number of scattered logs, though that number might be believed to be large. There is not one particle of proof that they intentionally surrendered anything. All the evidence shows that it was assumed by all the parties to that transaction, including Waterman himself, that the claim of the bank was in no way affected by the transaction. Milo Smith, Waterman's own agent, and appellee's own and only witness in this suit, is the most explicit upon this point (*supra*, p 16.)

If, then, in the minds of all the parties to this transaction, the claim of the bank was not to be affected by it, "did not connect itself with the transfer of the land," as Milo Smith says, it follows of necessity that there must have been an implied understanding or agreement that the equitable lien of the bank for the payment of its debt

should survive the reconveyance. It is not necessary to suppose that the minds of the parties traveled over all the necessary legal consequences of such reconveyance. Judge Beck, the trustee, was the only counsel present to direct their attention to those consequences. It appears highly probable that all parties intended that the grantees should have power to sell these lands so reconveyed and give good title to them.

All the parties to that transaction were known to be men of ample financial responsibility. Waterman especially was known to be a man of large wealth and his personal responsibility would afford ample security.

But if, by the implied agreement the lands, upon reconveyance by the trustee came into the hands of the stockholders, charged with a trust for the payment of the debt of the company, the sale of those lands would by no means discharge that trust. A court of equity can compel each stockholder, who subsequently sold lands conveyed to him by the trustee to account for the proceeds in so far as may be necessary to meet the requirements of the trust, and such is precisely the object of appellant's suit. Appellant now asks for an accounting of the amount due to it from the Black River Lumber company and of the proceeds of the lands reconveyed to Waterman, and asks that appellees be directed to pay to appellant in the due course of administration, out of the proceeds of such lands, the debt found to be due to appellant from the Black River Lumber Company.

A stronger case for relief on the ground of common justice could not well be made. Waterman was a director and the largest stockholder of the Black River Lumber company, and had the greatest interest in its success. It had to borrow every dollar it spent, and it

spent heavily. His own partner, M. M. Ketchum, was general manager of the company during its brief existence. But Waterman knew the Ketchums of old—they were his partners. With all his wealth and all his interest in the company he never loaned a dollar to the treasury of the company, and never lost a penny from beginning to end by reason of the formation and subsequent collapse of the company. For the Milo Smith judgment (really Waterman's own judgment, Rec., 105, 106), which he discharged stood for a portion of the encumbrance upon the tract of land which he himself had contributed, for which he was liable before the lumber company was formed and which he would have been compelled to pay if the lumber company had never been formed. Nay, Waterman was actually gainer by reason of the collapse of the company, for by taking a conveyance from the trustee of the entire Ketchum & Waterman tract he was able to make good a private indebtedness due to himself from Ketchum. (Rec., 53, § 8.)

Such was Waterman's contribution to the success of the company. The Bank of Fort Madison, on the other hand, freely loaned its money to the company under the Ketchum management, and when the bank sought and obtained the security of a chattel mortgage which prudence demanded, the Ketchums fell to harrassing the bank with litigation, while Waterman kept himself at a safe distance. And now Waterman's representatives seek to identify the banking corporation with the two men, Brewster and Joseph A. Smith, who control it, in order to throw upon them, the two smallest stockholders of the lumber company, the entire losses of the lumber company, amounting to over $58,000.

IV.

After the case had been presented to the court below, and before decision, a doubt was expressed by the court whether the stockholders' settlement at the Fort Madison meeting in 1882 (as shown by the testimony of Joseph A. Smith, Rec., p. 110) did not include appellant's claim, and thereupon appellant presented its petition for rehearing (Rec., 162) with the affidavits of the Hon. Joseph M. Beck, one of the justices of the Supreme court of Iowa, Samuel Athee, W. H. Kretzinger and Charles Brewster attached, praying to establish by the testimony of the above named affiants that the settlement in question did not include or in any way affect the indebtedness of the lumber company to the bank. Appellant offered to show by Judge Beck (see Judge Beck's affidavit, Rec., p. 169, 170) that

—" he was present at frequent interviews and consultations had at Fort Madison in March, 1882, by the parties interested in said lands and said Black River Lumber company, for the purpose of consummating a settlement of their affairs and interests involved therein. He became and was familiar with the purposes and objects of the parties concerned in making the settlement and arrangement, and well knew the interests each had in the property involved."

Affiant further declares that there was no agreement, understanding or expressed purpose on the part of any of the persons concerned to release or relieve the Black River Lumber company of liability upon a debt owed by it to the Bank of Fort Madison, nor to discharge any claim or right which said bank held to pursue its remedy against the property of the Black River Lumber company or against the stockholders thereof. There was no proposition or request made by any one to that effect, and no one claimed that it ought to be done in making the final settlement.

Affiant further says that all of the parties to the settlement and arrangement expressed or concurred in the opinion and belief that the assets of the Black River Lumber company then in the hands of its receiver, consisting mainly, if not wholly, of logs cut from the lands, then in Black River or its tributaries, were of sufficient value to pay all the indebtedness of the company, and leave a large surplus for distribution to the persons entitled thereto. This opinion and belief was frequently expressed by James S. Waterman, and no doubt or question thereof was expressed by any one. It was a matter of frequent conversation, and so fully was the affiant impressed with belief of the correctness of these opinions that he afterward heard with astonishment that the assets of the company were insufficient to pay its debts."

To substantially the same effect was the proposed testimony of the other witnesses as shown in the affidavits of Samuel Athee (Rec., 165), W. H. Kretzinger (Rec., 166) and Charles Brewster (Rec., 167). The affidavit of the trustee, Judge Beck, is entitled, we think, to especial consideration, as being that of a witness, not only impartial, but whose legal training and habits would lead him to consider the legal consequence of any transaction in which he took part. This testimony the court declined to receive.

The denial of the petition for rehearing, in the absence of any opinion in disposing of the case, leaves us in doubt as to the right given by the court to the proposed testimony. The affidavits in question so strongly tended to establish the fact that there was no release of the bank's claim at the stockholders' meeting, that if the court below was inclined to deny relief because of such release, dictates of natural equity would have required the admission of the offered testimony.

V.

THE FIRM ENDORSEMENT PLACED BY HENRY KETCHUM UPON THE NOTE OF THE LUMBER COMPANY FOR $10,000 WAS WITHIN THE SCOPE OF HIS AUTHORITY TO BIND THE FIRM OF KETCHUM & WATERMAN, AND THEREFORE THE ESTATE OF JAMES S. WATERMAN.

Concerning this endorsement, the proofs show the facts to be as follows:

The firm of Ketchum & Waterman, on June 25, 1878, the day of its formation, was composed of Henry Ketchum and James S. Waterman. The partnership articles appear in the record at page 82. The sole assets of the firm were 30,000 acres of pine lands subject to a purchase money mortgage for $75,000, given by Ketchum & Waterman to the railroad company, from which a few days prior thereto the lands had been jointly purchased by them for the sum of $100,000. Waterman and Ketchum were each seized of an undivided one-half of the lands in fee simple as tenant in common. The purchase was made with a view to the formation of the firm. The terms of the partnership were briefly as follows: The lands and the timber thereon were to be sold by Ketchum and the proceeds applied as follows (Rec., 146):

1st. To the payment of the $75,000 purchase money mortgage.

2d. Interest on all advances made by either partner to the original cash payment of $25,000, together with "all personal expenses of either party incurred in or "about the joint affairs."

3d. The remainder should be "equally divided "between the parties."

The articles provided that Ketchum should "devote "his entire time to the supervision of said lands, finding "purchasers for the same or the timber thereon, and "negotiating sales, paying taxes and doing all other things "necessary and proper in the premises, which by reason "of his greater experience in such business and his "nearer residence to said lands he is better qualified to "do."

The articles further provided that "*the proceeds of all "sales of property shall be used to complete the purchase "price of said lands until the same is fully paid, after "which the same is to be equally divided between the "parties.*"

The firm business was carried on at La Crosse, Wisconsin. Waterman was then, and up to his death in 1883, a resident of Illinois. He was rarely in La Crosse. The articles were in writing, but neither the Bank of Fort Madison, nor any of the Fort Madison stockholders, had any notice or knowledge thereof.

Shortly after the formation of the firm and before the organization of the lumber company, Henry Ketchum assigned one-half of his interest in the firm to his son, M. M. Ketchum, who was thereupon admitted to the firm and seems to have become the owner of one-fourth of the capital thereof.

In November, 1879, the lumber company was formed, and the east 25,000 acres of the lands of the firm were conveyed to Judge Beck, and 2,500 shares of the stock of the lumber company was issued therefor to the members of the firm, Waterman receiving 1,250, H. Ketchum

625, and M. M. Ketchum 625 shares, amounting to four-sevenths of the entire capital, being more than a controlling interest, and making the firm of Ketchum & Waterman practically the owners of the lumber company. The sole beneficiary under this conveyance (Rec., 31) was the Black River Lumber Company, and by its express terms *the lumber company assumed and agreed to pay the entire purchase money mortgage for $75,000*, which was, as before stated, a first lien upon not only the 25,000 acres conveyed to Judge Beck, but *also* upon the 5,000 acres retained and continued to be owned solely by the firm of Ketchum & Waterman. After the conveyance to Judge Beck the firm continued its business, which consisted of the management of the affairs of the lumber company, the disposition of the remaining 5,000 acres and the timber thereon and the sale of the timber previously cut by the firm from the 25,000 acres. M. M. Ketchum was the general manager of the lumber company from its formation until April, 1880. He was also, during that period, acting manager for the firm of Ketchum & Waterman, conducting the business of both the firm and the company. The business of the firm and the lumber company was the same. The firm continued its business until April, 1880, when it was dissolved by Waterman. The firm was dissolved, and the lumber company passed into the hands of a receiver at the same time. On March 22, 1880, the manager of the lumber company required $10,000 to meet its most urgent supply and labor bills, incurred in cutting and rafting its logs. The bank would not advance the cash except upon the note of the lumber company, indorsed by the firm of Ketchum & Waterman. The lumber company had no funds, and the advance was necessary to save it

from insolvency. The firm indorsement was thereupon made by Henry Ketchum (see note and indorsements, record, page 5), the note was delivered to the bank, and the funds were sent by the bank to the lumber company.

The firm of Ketchum & Waterman by the well settled doctrine of this court, thus became liable as *joint makers* of the note, and not as guarantors or indorsers.

Rey v. *Simpson*, 22 Howard, 341.
Good v. *Martin*, 95 U. S., 90.
Bendey v. *Townsend*, 109 U. S., 667.

The bank knew that the firm practically owned the lumber company, because it knew that the various members of the firm held more than a majority of the capital stock of the lumber company. It is in proof (Rec., 113–114) that once before the endorsement in question, Henry Ketchum, acting for the firm of Ketchum & Waterman, had borrowed $2,000 from the appellant, and executed therefor the note of the firm which was duly paid at maturity. The note for $10,000 was not paid by the lumber company at maturity and went to protest. Notice thereof was sent to Waterman. He made no denial of the authority of Ketchum to so endorse the note until more than two years had gone by, when he raised the question for the first time at the stockholders' meeting in 1882, and desired a release from his liability. Such release the bank then and has always refused to execute. The amount due on the note is $10,000 and interest at eight per cent. per annum since June 25, 1880.

Upon the hearing in the court below, the complainant introduced due proof of the note, the endorsement and the partnership, showing clearly that Waterman was a

general partner in the firm on March 22, 1880, the date of the note and endorsement. Defendants thereupon undertook to show the precise relations of Waterman to the firm by introducing in evidence the original articles of partnership, and rested their defence to all liability upon the endorsement upon the contention that the 2,500 shares of stock of the lumber company held by the Ketchums and Waterman were their individual property and not the property of the firm, by reason whereof, it was alleged the endorsement in no way benefited the firm, and that in making the same Henry Ketchum exceeded the scope of his authority to bind the firm.

The consideration of this question, it will be seen, involves, first, the ownership of the 2,500 shares of stock. If owned by the firm the liability of the defendants upon the endorsement is clear; and if the shares were not firm property and the endorsement in no other manner benefited the firm, and was without authority, it is equally clear that the endorsement bound no member of the firm except Henry Ketchum.

1. *The 2,500 shares of stock were firm property at the time of the endorsement.* The 25,000 acres of land, the sole consideration for which the 2,500 shares of stock were issued, were firm property. They were five-sixths of the entire assets of the firm. The formation of the lumber company and the conditional conveyance of the lands to a trustee, in exchange for shares of stock; was not such a *sale* of the land as was contemplated by the partnership articles. The 25,000 acres were simply *exchanged for* the 2,500 shares of stock, and until this stock was sold, or otherwise converted into cash, there could not, under the express terms of the articles, be any division of "proceeds" among the partners. All such "pro-

ceeds " were, *before any division*, " to be used to complete " the payments of the purchase price of said lands until " the same is fully paid." It was clearly the intention of these partners to divide nothing but the cash proceeds; and none of such proceeds were to be divided until the purchase money mortgage of $75,000, upon which both Waterman and Henry Ketchum were severally personally liable, was fully paid. It is unqestioned that the whole of this purchase money mortgage was unpaid at the time of the issue of the stock and at the time of this endorsement. As far as disclosed by the record it is still unpaid. The 2,500 shares were not, nor could they be used to complete the purchase money payments to the railroad company. They were to have been sold and the cash proceeds used to meet these payments in default of the same by the lumber company. Nor does the mere fact that the shares belonging to the firm, stood in the names of the three partners according to their respective interests in the firm, negative the probability that the shares were in reality, firm property. Shares of stock owned by a corporation or by a firm, frequently, if not commonly, for obvious reasons of convenience in voting and transfer, stand on the books in the name of some officer of the corporation or member of the firm during the same.

A moments reflection will show the object of the clause forbidding division of any proceeds until the large purchase money mortgage was paid. In no other way could either of the partners protect himself against the defaults of the other, or against the defaults of the firm. To divide the stock, and permit the Ketchums to dispose of their 1,250 shares and pocket the proceeds, would have deprived Waterman of one-half of the means with which

he rightfully expected to meet the purchase money mortgage in case of default in the payment of the same by the lumber company—doubtless a possible contingency in his mind when forming the firm, and an actual fact as events subsequently demonstrated. The clause equally protected Henry Ketchum against similar defaults on the part of Waterman, non-resident of Wisconsin. Indeed it was but simple equity that the 2,500 shares of stock taken in exchange for the five-sixths part of the firm lands, should remain firm property until the mortgage should be fully paid. From all that appears in this record the equity of redemption in the 30,000 acres was the only property of any kind then owned by either of the Ketchums or by Waterman. Dictates of ordinary prudence required the insertion of the clause in question. There being, then, at the time of the endorsement in question, no right to either party, according to the express terms of the partnership agreement put in evidence by the appellees, to treat the 2,500 shares otherwise than firm property, it is clear that no such right exists as against the appellant, a *bona fide* creditor of the firm.

It will be observed that the record contains no evidence that the stock was not the property of the firm except the fact that it stood on the books of the company in the names of the individuals composing the firm. The appellees have not even attempted to show in any way that the shares were not the property of the firm. If such was the fact, Milo Smith, Watermans agent, would doubltess have known it. Both Ketchum and Waterman are dead and the books of the firm have never been accessible to appellant. The attitude of the firm towards the lumber company, the devotion of the entrie time of M. M. Ketchum and a large

part of the time of Henry Ketchum to the affairs of the company, the willingness of Henry Ketchum to endorse, when knowing that failure to bind the firm would render him alone responsible, all tend to prove that the shares were firm property. But were the ownership of the shares, in view of the above facts, still doubtful, such doubt is, we assert, fully set at rest by the partnership articles which clearly establish the intention of the parties that there should be no division of proceeds until the purchase money mortgage was fully paid.

2. *There was another and equally important benefit accruing to the firm from the indorsement.*

It will be remembered that sole assets of the firm were 30,000 acres of pine lands, subject to a purchase money mortgage for $75,000. The east 25,000 acres were in November, 1879, exchanged for stock of the lumber company which assumed the payment of the entire $75,000. The firm retained the remaining 5,000 acres, and at the time of the indorsement were cutting logs therefrom. The 5,000 acres, like the 25,000 acres exchanged for stock, *were subject to the $75,000 mortgage*, which, at the time of the indorsement, was wholly unpaid. The payment of this entire mortgage had been assumed by the lumber company. At the date of the indorsement the lumber company was financially embarrassed, and the $10,000 it then desired to borrow from appellant was needed to prevent insolvency. If the lumber company became insolvent, the payment of this large mortgage would devolve upon the firm of Ketchum & Waterman. The appellant would not make the loan unless the company's paper was indorsed by the stockholders whose names appear upon the back of the note. All parties then believed that if the credit of the company could be

sustained for a few months, the large number of logs belonging to the company and all cut, though not yet marketed, would be more than sufficient to pay all the debts of the company, including this mortgage for $75,000. Henry Ketchum, the senior member of the firm, was then living in La Crosse. His son, M. M. Ketchum, the junior partner, was then the general manager of the lumber company, and was personally conducting its affairs. Both the Ketchums were fully familiar with the financial condition of the company. By the partnership articles (Rec., 82), Henry Ketchum was authorized to do "all "things necessary and proper in the premises which "by reason of his greater experience in such busi-"ness and his nearer residence to said lands, he "is better qualified to do." Under such circumstances, and solely in order *to protect the firm, not only in the ownership of the 5,000 acres*, which if the lumber company continued solvent, the firm would own unincumbered, but also in the ownership of the 2,500 shares of stock of the company, four-sevenths of its entire stock, the firm endorsement was given by Henry Ketchum, the loan was made by the appellant, and the money sent to M. M. Ketchum, the general manager and junior partner. The continued solvency of the lumber company, the guarantor of the large mortgage executed by the firm, was a matter of the most vital interest to the firm. The failure of the lumber company would at once cast upon the firm indebtedness to the amount of $75,000, from the payment of which the firm had every reason to believe, and did believe, it had been wholly relieved. How then can it be justly claimed that the endorsement was not for the benefit of the firm, or that Henry Ketchum in using the credit of the firm to protect

firm property, exceeded his authority to bind the firm? The proofs show clearly the wisdom of Henry Ketchum in so using the credit of the firm. The 5,000 acres, assuming them to have been of the same average value as the 25,000 acres, cost the firm, at the time of their purchase from the railroad company $16,000. At the same rate at which the other lands were exchanged for stock the 5,000 acres were worth $50,000 in November, 1879. And in 1882, after large quantities of pine lumber had been cut off therefrom, they were worth at least $55,000. Henry Ketchum, in pledging the firm's credit to the extent of $10,000, to preserve such a large interest of the firm, was clearly not only acting prudently and according to business principles, but was exceedingly fortunate in being able to negotiate such a loan. He saw then, as we can now see, that if the appellant declined to make the loan, the lumber company would become insolvent and the firm of Ketchum and Waterman would be forced to pay the whole of the mortgage for $75,000. If the transaction had resulted in success, the benefits accruing therefrom to the firm of Ketchum and Waterman would not have been less in any degree, than those accruing to the lumber company. Such being palpably the case, it is inequitable in the highest degree that the firm now repudiate the authority of Ketchum.

3. *There was still another and equally direct benefit accruing to the firm from the endorsement.*

It will be remembered that the purpose in borrowing the $10,000 from the appellant, was to pay off the most pressing of its supply and labor bills, incurred by the lumber company in preparing its timber for the market. The money was received and used by it for that purpose. By virtue of statutory provisions then in force, (R. S.

Wisconsin (1878), Section 3,329,) all persons furnishing such supplies or labor in the counties in which the lands of the lumber company lay, obtained a lien upon the timber superior to all other claims or liens. Both the Ketchums and Waterman were lumbermen of great experience and could not have been ignorant of this lien law. It may be assumed then, that this entered into the calculations of Ketchum in making the endorsement. If, as we have already shown, by obtaining the $10,000, the lumber company became able to market its logs and satisfy its debts, the firm were relieved from payment of the $75,000 mortgage and would have an unincumbered title to the 5,000 acres. If, on the other hand, by reason of the inability of the lumber company to satisfy the $75,000, the lands reverted to the firm, the statutory liens would have been reduced by the amount of the loan; so that in neither event would any loss have accrued to the firm, and in both cases would it have obtained a direct and valuable benefit.

The legal principles involved in this branch of this case are stated as follows by Mr. Justice MATTHEWS in *Irwin* v. *Williar*, 110 U. S., 499, 505:

" The liability of one partner for acts and contracts " done and made by his copartners without his actual " knowledge or assent, is a question of agency. If the " authority is denied by the actual agreement between " the partners, with notice to the party who claims under " it, there is no partnership obligation. If the contract of " partnership is silent, or the party with whom the deal- " ing has taken place has no notice of its limitations, the " authority for each transaction may be implied from the " nature of the business according to the usual and ordi- " nary course in which it is carried on by those engaged

" in it in the locality which is its seat or as reasonably " necessary or fit for its successful prosecution. If it can " not be found in that, it may still be inferred from the " actual though exceptional course and conduct of the " business of the partnership itself, as personally carried " on with the knowledge, actual or presumed, of the " partner sought to be charged."

The bank had no notice of the contract of partnership or of its limitations; and applying the foregoing principles to the case at bar, we think it must be conceded that:

(1.) The authority to make the indorsement in question was conferred by the actual agreement between the partners.

(2.) If the actual agreement cannot be construed as to confer such authority, the same " may be inferred from " the actual though exceptional course and conduct of " the business of the partnership itself as personally car- " ried on with the knowledge, actual or presumed, of the " partner sought to be charged." Such authority was fairly inherent to the intrinsic nature of the business in which the partnership was actually engaged.

In this last view, even supposing the ownership of the 2,500 shares to have been in the individual partners, it is yet clear that in lending the credit of the firm to the lumber company which was attempting to develop lands practically owned by the firm, Henry Ketchum was not acting in excess of either the spirit or the letter of his written authority " to do all other things necessary and " proper in the premises, which by reason of his greater " experience in such business and his nearer residence to " said lands, he is better qualified to do."

We think it sufficiently appears from the foregoing that the firm shared directly in the consideration of the note.

4. *Waterman's executors are equitably liable upon the note.*

At the formation of the partnership in June, 1878, Henry Ketchum and James S. Waterman owned as tenants in common the entire 30,000 acres recently purchased by them from the railroad company (Rec., 146). When the lumber company was formed, in November, 1879, the 25,000 acres contributed by the firm were owned in the same manner. Henry Ketchum is dead. M. M. Ketchum resides in Minnesota. Under the law of the state of Illinois, appellant is entitled to proceed in equity against the estate of the deceased partner, James S. Waterman.

Mason v. *Tiffany*, 45 Illinois, 392.
Doggett v. *Dill*, 108 Illinois, 560.

Assuming that the firm endorsement made by Ketchum upon the $10,000 note was in excess of his power to bind Waterman, it is clear it legally bound Ketchum himself, and, equitably, his interests in the 25,000 acres then vested in the trustee. This lien was one which would have been recognized by any court in winding up the affairs of the lumber company, and in distributing its assets among the stockholders, after payment of the corporate debts. When the stockholders met at Fort Madison, in 1882, Waterman knew of the firm endorsement, and sought to be released therefrom. This the bank declined to do. Waterman, notwithstanding this, withdrew from the lumber company not only his one-half of the 25,000 acres, but also the other half, belonging to Henry Ketchum, receiving a deed conveying the entire

tract. Waterman received Ketchum's one-half as security for some debts then owing him by Ketchum. (Rec., 54; clause 8th.) From the sale of Ketchum's half, Waterman and his executors have received many times the amount of the note. Upon these facts, it is but equity to permit the liability of Ketchum upon the endorsement to follow his lands into Waterman's hands, and the proceeds thereof now in the hands of his executors. Waterman received Ketchum's land with full knowledge of the endorsement, and the equitable lien of the bank followed the land and its proceeds in Waterman's hands.

In conclusion, we submit that in failing to find the Waterman estate liable for the unpaid indebtedness of the lumber company to the bank, and in also failing to adjudge that estate liable for the firm endorsement upon the $10,000 note, the court below was led into such error as to necessitate the reversal of its decree, with directions to enter judgment in favor of appellant as prayed in its bill of complaint.

Theodore Shelden

Solicitor for Appellant.

Henry Strong

of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1888.

THE BANK OF FORT MADISON,
Appellant,
vs.
PHILANDER M. ALDEN ET AL.,
Appellees.

Appeal from Northern District of Illinois.

BRIEF FOR APPELLEES.

JOHN P. WILSON,
SOLICITOR FOR APPELLEES.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

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Appellees.

Appeal from Northern District of Illinois.

BRIEF FOR APPELLEES.

In February, 1885, appellant filed the following claim against the estate of James S. Waterman in the county court of DeKalb county, State of Illinois, viz:

"Estate of James S. Waterman, Dr., in account with "the Bank of Fort Madison.

"To cash advances made between November 3, 1879, "and April 17, 1880, to the Black River Lumber Com- "pany, now insolvent, and for which the said bank re- "covered judgment against the said Lumber Company in "the Circuit court of the United States for the Western "district of Wisconsin, January 17, 1884, for which

"advances, judgment, and interest thereon the above "estate is liable to the amount unpaid upon the capital "stock of said Lumber Company held at the time of such "advances by the late James S. Waterman, or owned by "the late firm of Ketcham & Waterman at the time of "such advances, or arising from the statutory equity or "common law liability of said Waterman or said firm as "officers or stockholders in said lumber company, and a "portion of which said advances were secured by the "note of the said Lumber Company, duly endorsed by the "said firm, and a copy whereof is hereto annexed, which "said judgment was for $72,366.14." (Rec., 4.)

Subsequently the suit was removed by appellant to the Circuit court of the United States for the Northern district of Illinois, and in January, 1886, under a stipulation permitting it to file its bill of complaint as repleader, it filed a bill in chancery, basing therein its right to a decree against appellees solely upon the fact that James S. Waterman had not paid in full for his stock in the Black River Lumber Company, and that the firm of Ketcham & Waterman had endorsed one of the notes for $10,000 held by appellant, and that said Waterman was liable upon said endorsement, the prayer of the bill being as follows:

"In consideration whereof, and to the end that the said "Philander M. Alden and George S. Robinson, executors "of the estate of James S. Waterman, deceased, may "without oath (their oaths and the oaths of each of them "being hereby waived), in pursuance of the statute in "such case made and provided, full, true, direct, and per-"fect answer make to all and singular the matters and "things hereinbefore stated and charged, and that they "may particularly answer how much was paid in by said "James S. Waterman or by them upon his said subscrip-

"tion, and that an account may be taken of the amount "paid by the said James S. Waterman upon his said sub- "scription, and of the amount yet unpaid thereon, and of "the amount due from the said Black River Lumber "Company to your orator.

"And that the said defendants, as executors, may be "decreed to pay in due course of administration, so much "of the balance found unpaid on the stock subscription of "said James S. Waterman as will be sufficient to pay the "indebtedness of said company due to your orator.

"And that an account may be taken of the sum now "due upon the said note of March 22, 1880, guaranteed "as aforesaid by the firm of Ketcham & Waterman, and "that the said defendants may be decreed to pay your "orator the sum so found to be due in the course of "administration.

"And that your orator may be further and otherwise "relieved in the premises, as the nature of the case may "require and according to equity and good conscience may "seem proper."

Two grounds of relief only are set up in the bill, viz: That Waterman did not pay to the Black River Lumber Company the full par value of the stock of said company issued to him, and that he was liable on the firm endorsement of Ketcham & Waterman on a $10,000 note. The bill alleges that Waterman subscribed for 1,250 shares of the stock of said company, of the par value of $100 each, and "that said Waterman never at any time paid any cash "upon his said subscription; that the sole contribution "said Waterman ever made thereto was a conveyance of "certain tracts of pine lands in said State of Wisconsin to "a trustee for the use of said corporation upon certain con- "ditions therein mentioned; that the actual cash value of

"said lands so conveyed at the time of said conveyance, or "at any time thereafter, did not exceed forty per centum "of the amount subscribed by said Waterman to the capi- "tal stock of said corporation; that said pine lands were "never conveyed by said trustee to said corporation, but "were subsequently reconveyed by said trustee, with the "consent of the other stock subscribed to said Water- "man." (Rec., 11.)

The foregoing quotation from the bill is the only allegation therein contained relating to the reconveyance of any lands to James S. Waterman, and the only purpose of the statement therein made in regard to said conveyance was evidently for the purpose of showing that Waterman had never paid his subscription for the stock of the company. The allegation in the bill that the land was subsequently reconveyed by the trustee to Waterman is untrue in fact, as the trustee never made any reconveyance to Waterman, and it is not now claimed that he did. It appears from the answer of the defendants and the evidence in the case, that the Black River Lumber Company was formed by seven gentlemen who owned certain pine lands in the state of Wisconsin, upon which there were encumbrances for purchase money; that it was agreed between these parties that each should contribute his interest in the pine lands to the Black River Lumber Company in payment for a certain number of shares of stock of the Black River Lumber Company, and that the company should assume and pay the encumcumbrances upon said pine lands, together with the taxes levied thereon, and that the lands should be conveyed to Judge Beck, as trustee, of Iowa, to be held by him until the Black River Lumber Company should pay and discharge the encumbrances upon the land

together with the taxes, and then to convey the same to the lumber company. In pursuance of this agreement the company was formed. The parties individually subscribed for the number of shares of stock in the company as agreed upon, and in payment thereof conveyed to Beck as trustee the lands agreed to be contributed by them respectively to the company. Full paid certificates of stock were issued to the respective parties for the amount subscribed by them upon their making their respective conveyances to Judge Beck. Five of the parties who joined in forming the Black River Lumber Company lived at Fort Madison, Iowa, and the lands conveyed by them to Judge Beck for the company were owned by them as tenants in common prior to the formation of the Black River Lumber Company. James Brewster and Joseph A. Smith, two of the parties living at Fort Madison, owned all the stock and were respectively cashier and president of the Bank of Fort Madison, the appellant in this case. In the agreement for the formation of the Black River Lumber Company it was provided that the parties not residing at Fort Madison should advance to the Black River Lumber Company $27,260.42 on or about December 1, 1879, for the purpose of paying part of the deferred purchase money on the lands conveyed by them to the company, and should receive the company's notes therefor, maturing on or before July 1, 1880. And it was further agreed that the parties living at Fort Madison should advance two-thirds of $27,260.42, to be used in carrying on the business of the Black River Lumber Company, and also for the like purpose an "amount "equal to three-fourths of what said parties of the second "part (*i. e.* parties not residing in Fort Madison) have ad- "vanced on logs which are to be gotten out this coming

" winter " for which advances the Bank of Fort Madison parties were to receive the notes of the company. The advances were made by the Fort Madison parties, they receiving therefor the notes of the Black River Lumber Company which were discounted by appellant, which notes formed part of the claim sought to be enforced by appellant in this suit. (Rec., 13.) The Black River Lumber Company was formed on the 3d day of November, 1879 (Rec., 11), and the first advance to the company was made the same day. All the advances to the Black River Lumber Company made by the appellant were made with full knowledge that all the stock of the company was fully paid for by the conveyance of pine lands under the agreement in pursuance of which the company was formed. The agreement that the stock should be paid for by the conveyance of pine lands was not a fraud upon appellant because all of its stockholders and officers, viz: Smith and Brewster, were parties to the agreement by which the stock was so paid for, and made the advances to the lumber company with the full knowledge that the subscriptions of the stock had been made in pursuance of the agreement that it should be so paid for, and that the agreement had been fully performed and executed, and that there was no liability on the part of Waterman to pay anything additional for his stock.

In the case of *Coit* v. *The Gold Amalgamating Company*, 119 U. S., 343, held in a case similar to the one at bar that to entitle a complainant to relief in such a case it was necessary that " actual fraud was committed " in the payment of the stock and that the plaintiff had " given credit to the company from a belief that its stock " was fully paid." This decision was published after the case at bar was at issue and the evidence closed. It is

not alleged in this case that there was any actual fraud in the payment of the stock with property, or that appellant gave credit to the company from a belief that its stock was fully paid in any other way than the way in which it was in fact paid for. Since the publication of the decision of *Coit* v. *The Gold Amalgamating Company*, *supra*, appellant has not pressed its claim against the Waterman estate on his subscription to the stock of the Black River Lumber Company, rightfully regarding said case as conclusive against such claim. It is now contended, however, by appellant that the decree of the Circuit court dismissing its bill should be reversed on the ground that the lands reconveyed to Waterman were equitable assets of the Black River Lumber Company, and that by such reconveyance the company was rendered insolvent and that therefore appellant has a right to recover from Waterman's estate the value of the lands so reconveyed to him, not exceeding the amount of its indebtedness.

On behalf of appellees we contend:

First: The allegations in appellant's bill of complaint in regard to the reconveyance to James S. Waterman of the lands conveyed by him to Judge Beck as trustee for the Black River Lumber Company, did not entitle it to a decree against Waterman's estate.

Second: That the facts connected with the reconveyance of said lands to said Waterman are such as to defeat appellant's claim to a decree against Waterman's estate by reason of said reconveyance.

Third: That the Wisconsin suit, in which a receiver was appointed of all the assets of the Black River Lum-

ber Company, and to which appellant was a party, is a bar to this suit.

Fourth: That appellant, not being a judgment creditor, has no standing in a court of equity.

Fifth: That the court did not err in denying appellant's petition for a rehearing.

Sixth: That Waterman was not bound by Ketchum's endorsement of the firm name of Ketchum & Waterman on the ten thousand dollar note, dated March 22, 1880.

ARGUMENT.

I.

THE ALLEGATIONS IN APPELLANT'S BILL OF COMPLAINT IN REGARD TO THE RECONVEYANCE TO JAMES S. WATERMAN OF THE LANDS CONVEYED BY HIM TO JUDGE BECK, AS TRUSTEE FOR THE BLACK RIVER LUMBER COMPANY, DID NOT ENTITLE IT TO A DECREE AGAINST WATERMAN'S ESTATE.

The question before this court is whether the Circuit court erred in dismissing appellant's bill. If appellant was not entitled to a decree upon the case made in its bill, then there was no error in the dismissal of the bill. Appellant is now seeking to reverse the decree of the Circuit court upon alleged facts not stated in its bill of complaint, and upon a case which has no foundation in the bill. A careful examination of the bill of complaint will show that the only grounds of relief therein set forth against Waterman's estate are, first: that Waterman had not fully paid his subscription to the capital stock of the Black River Lumber Company, and second: that he was liable upon the endorsement of Ketcham & Waterman upon the ten thousand dollar note. The allegation in regard to the reconveyance of certain lands to Waterman contained in the bill is only an incidental statement made as bearing upon the question as to how much was paid upon his subscription to the capital stock of the company. The only allegation in the bill upon this point is as follows: "That said "Waterman never at any time paid any cash upon his "said subscription; that the sole contribution said Water-

"man ever made thereto was a conveyance of certain tracts "of pine land in said State of Wisconsin to a trustee, for the "use of said corporation, upon certain conditions therein "mentioned; that the actual cash value of said lands so "conveyed, at the time of said conveyance, or at any time "thereafter, did not exceed forty per centum of the "amount subscribed by said Waterman to the capital "stock of said corporation; that said pine lands were never "conveyed by said trustee to said corporation, but were "subsequently reconveyed by said trustee, with the con- "sent of the other stock subscribed, to said Waterman." (Rec., 11.)

The date of the reconveyance is not alleged. The conditions upon which the lands were conveyed to the trustee are not stated, nor is it alleged that said conditions were complied with so as to give the company any beneficial interest in the land. It is not alleged that the rights of appellant were injuriously affected by such reconveyance, or that the same was not rightfully made by the trustee under the terms of the conditions upon which the lands were conveyed to him. The allegation of the bill amounts simply to this, that James S. Waterman conveyed certain lands not exceeding $50,000 in value to a trustee for the use of the corporation upon certain conditions named in the conveyance to the trustee, and that the lands were subsequently reconveyed by the trustee, with the consent of all the stockholders. It is too plain for discussion that these facts alone would not entitle appellant to a decree against Waterman's estate. Appellant in its bill does not seek relief upon the ground of such reconveyance. The statement made is purely incidental to, and in support of that claim the Waterman did not pay his subscription to the capital stock of the Black River Lumber

Company. It will doubtless be claimed that other facts are disclosed in the evidence which do entitle appellant to a decree against Waterman's estate by reason of the reconveyance of the lands to said Waterman. These other facts so relied upon are not all the facts connected with the transaction. No issue was made in the pleadings as to whether appellant was entitled to an equitable lien upon the lands conveyed to Waterman or the proceeds thereof. If such an issue had been made, the facts disclosed by the evidence might, and doubtless would, have been very different. The court could not in a suit to charge Waterman for his unpaid subscription, determine whether appellant was entitled to charge the lands conveyed to Waterman, or the proceeds thereof, with a lien in favor of appellant. The law upon this question is well settled in this court. We cite a few of the cases:

"In equity proceedings the proof and allegations "must agree. A party can no more succeed upon a case "proved but not alleged, than upon a case alleged but not "proved."

Foster v. *Goddard*, 1st Black, 506.

"The maxim that a decree must be sustained by the "allegations of the parties as well as by the proofs in the "cause, is too well established to be disregarded."

Carneal v. *Banks*, 10 Wheaton, 181.

"It is certainly a correct principle that the court cannot "decree any plaintiff, whatever he may prove, more than "he claims in his bill. Nothing further is in issue between "the parties."

Simms v. *Guthrie*, 9 Cranch, 19.

"In equity the proofs and allegations must correspond.

" *The examination of the case by the court is confined to* " *the issues made by the pleadings.* Proofs, without the " requisite allegations, are as unavailing as such allega- " tions would be without the proofs required to sup- " port them."

Rubber Co. v. *Goodyear*, 9th Wallace, 793.

Under the cases above cited it is clear that appellant was not entitled to relief upon the ground that the lands reconveyed to Waterman, or the proceeds thereof, were charged with a lien in favor of appellant. No issue was made upon that question, and no allegations in regard thereto are contained in the bill, and no mention thereof is made in the prayer for relief. The issues made in the pleadings are clear and definite, and are only two: Waterman's liability upon his stock subscription and upon the firm endorsement of Ketchum & Waterman. To have granted relief upon any other ground than the two mentioned would have been error, as no other grounds of relief were set up in the bill.

II.

THE FACTS CONNECTED WITH THE RECONVEYANCE OF SAID LANDS TO SAID WATERMAN ARE SUCH AS TO DEFEAT APPELLANT'S CLAIM TO A DECREE AGAINST WATERMAN'S ESTATE BY REASON OF SAID RECONVEYANCE.

Inasmuch as Waterman paid for his stock subscription by the conveyance of pine lands to Beck, as trustee, for the use of the Black River Lumber Company, under certain conditions named in the conveyance to Beck, and said lands were subsequently reconveyed to Waterman, it became important, under the issue made by the pleadings,

as to whether Waterman had paid for his stock, to prove some of the circumstances and agreements connected with the reconveyance of the lands. It appears that all the lands conveyed by the respective stockholders in payment of their stock were encumbered for purchase money, which was to be paid by the Black River Lumber Company. It appears from the deed to Beck as trustee (Rec., 29), that it was made a *condition* of the conveyance by Waterman that the company should "pay the said unpaid purchase money for said lands ac- "cording to the terms of said contract, and which contract "bears date the 17th day of October, 1879, and which is re- "ferred to and made a part of the conditions of this deed." By the contract referred to in and made part of said deed, it is provided "that said company shall assume and "pay all such deferred payments *as they mature*." The deferred payments on the lands conveyed to the trustee, matured in annual installments; the first became due on or about December 1, 1879, and it was provided by the articles of agreement, that the grantors should advance the money to take up the first installment so becoming due, and take the company's note therefor, payable on or before July 1st, following. Waterman advanced the money to make this payment, took the company's notes, and subsequently assigned said notes to Milo Smith, and upon the maturity of the note a judgment was obtained upon said notes in favor of Milo Smith. The reconveyance to Waterman was made in April, 1882, two years after the receiver had been appointed for the Black River Lumber Company, and two years after the company had become insolvent, as alleged in complainant's bill, (Rec., 14). It is admitted by appellant and by the argument of its counsel in this court, that the Black River Lumber Company

never performed the condition of the deed from Waterman to Beck as trustee. The company became insolvent prior to the maturity of the notes given for the money advanced by Waterman to pay the installment of purchase money maturing January 1, 1879. Before the deed of reconveyance was made the other installments of purchase money had matured, but had not been paid by the Black River Lumber Company. It had become impossible for the company to perform the condition and to entitle itself to a conveyance of the land. The company had likewise defaulted in paying the installments of purchase money upon the other lands conveyed to Beck as trustee by the other stockholders. Milo Smith, having recovered judgment against the company upon the notes given to Waterman for money advanced by him, was seeking to have the same paid out of the property in the hands of the receiver, and was disputing the question of priority in payment out of the funds in the hands of the receiver with appellant. Some time prior to the reconveyance Waterman and Milo Smith, his agent, met the Fort Madison parties at the Bank of Fort Madison and at the office of Judge Beck, and discussed the matter of having the land reconveyed to the respective parties by Judge Beck, as trustee. This conference was not a regular stockholders' meeting, which could not be held outside of the state of Wisconsin, where the company was organized. It was a meeting of the parties in interest to determine what disposition should be made of the lands conveyed to Judge Beck as trustee. There had been a complete failure of the condition upon which the lands had been conveyed, viz.: that the corporation should pay the installments of purchase money due thereon as they matured. Not only had there been a default, but it had be-

come impossible to perform the conditions, and it was important that some dispositions of the lands should be made so that the purchase money and taxes should be paid and the lands should not be lost. At this conference there was present Milo Smith, who held the judgment for $30,000, Smith and Brewster, who owned all the stock of the Bank of Fort Madison, and who were also its president and cashier; also all the stockholders of the Black River Lumber Company, except the Ketchums. At this conference it was unanimously agreed between the parties that the lands should be reconveyed to the respective parties. It was agreed as a part of the settlement that Milo Smith should waive his claim to priority in payment out of the assets in the hands of the receiver, and that the Bank of Fort Madison should have the preference in being paid out of the assets in the hands of the receiver (Rec., 60); also that Milo Smith should release the lands reconveyed to the Iowa parties from the lien of his judgment. (Rec., 78.) Joseph A. Smith, the president of the Bank of Fort Madison, testifies as follows:

"Q. Then your recollection is that no provision was "made for getting your land released from the lien of "that judgment?

"A. My recollection is that it was a settlement of all "claims when he deeded the land back. It made a com-"plete settlement between them.

"Q. Of everything between them?

"A. Yes, that is, so far as any claims were concerned, "of the land.

"Q. You understood that when the land would be "reconveyed you would get a good title to your land?

"A. Yes.

"Q. And you did not expect that that judgment would "be enforced against your land?

"A. No, sir.

"Q. Did you understand that there was any other un- "settled matter between you and the parties when that "was carried out?

"A. Nothing, but what was settled at that time. There "was an unsettled matter in reference to the boom com- "pany that Mr. Ketcham assumed to pay; one note of "several thousand dollars; and Mr. Atlee and I agreed to "pay the balance. There were two notes of $3,330 "each that we agreed to pay.

"Q. You have stated, Dr. Smith, that at this meet- "ing of the stockholders of the Black River Lumber "Company it was decided that there should be a recon- "veyance of the lands to the respective stockholders, and "that that should be a full settlement of all the claims of "the company?

"A. That is the way I understand it, sir.

"Q. Was there or wasn't there any reference then "had to the claim of the Fort Madison bank, then pend- "ing in the Circuit court of the United States for the "Western district of Wisconsin?

"A. I do not recollect anything, except that Mr. Milo "Smith stated that there was money enough in the hands "of the receiver to pay for all claims." (Rec., 63.)

The date of the conference at Fort Madison, Iowa, does not appear, but at pages 95 to 97 it appears that the matter was under consideration by the stockholders of the Black River Lumber Company for about a year. All the meetings of the stockholders had to be held in the State of Wisconsin. The first resolution shown is recited to have been offered by Charles Brewster, one of the two

stockholders and officers of the Bank of Fort Madison, and is as follows:

"*Resolved*, That in the opinion of the stockholders of "the Black River Lumber Company, represented in this "meeting and voting thereon, that it is expedient and for "the best interests of the stockholders and *creditors* of said "company, that a division of the lands of the company "should be had, and the same redeeded to the several par- "ties entitled thereto, as shown by the stock represening "the interest of the several parties now therein, or to "whomthey may direct."

Which resolution was adopted by a vote of all the persons in interest except a man by the name of Hyde, whose interest in the matter is not disclosed by the record. Other resolutions subsequently passed are shown by the record, the last being passed on April 14, 1882, from which it appears that Beck, the trustee, refused to comply with the resolution requesting him to convey the lands direct to the respective parties, and therefore a resolution was passed requesting said trustee to convey to the Black River Lumber Company, and directing the officers of the company to then deed the land to the respective parties. One year, lacking six days, elapsed between the first and last resolution, so that the matter was long under consideration, and doubtless fully understood by all the parties. It is now contended by appellant that Waterman took the lands reconveyed to him charged with a lien in favor of the Bank of Fort Madison for the indebtedness due it from the Black River Lumber Company, or rather that the Bank of Fort Madison is entitled to collect out of the proceeds of lands conveyed to Waterman the indebtedness due it from the Black River Lumber Company.

Counsel for appellant say: "The claim which the bank "now makes does not involve any repudiation of what "was done at that meeting (*i. e.*, the meeting at which it "was agreed the lands should be reconveyed). We do "not claim that the reconveyance of the lands was fraud- "ulent, either in intention or result; on the contrary, it "was a proper and highly advisable proceeding. The "purpose for which the lands were originally conveyed "to the trustee had become hopeless by reason of dissen- "sions among the stockholders of the lumber company." (Brief, 28.)

And again: "It appears highly probable that all par- "ties intended that the grantees should have the power to "sell these lands so reconveyed, and give good title to "them." (Brief, 30.)

Counsel base their claim to relief upon "an implied un- "derstanding or agreement that the equitable lien of the "bank for the payment of its debt should survive the re- "conveyance." And again: "But if, by the implied "agreement, the lands, upon reconveyance by the trustee, "came into the hands of the stockholders, charged with a "trust for the payment of the debt of the company, the "sale of these lands would by no means discharge that "trust." (Brief, 29, 30.)

It will be noted that the contention is that there was an implied agreement or understanding. It is not claimed that there was any express agreement or understanding, or that anything whatever was said in regard to the payment of the bank's claim, or that it should have a lien upon the lands reconveyed, or any claim upon or against the person to whom such lands were reconveyed.

The contention is, that by the mere fact of the agreement between all the parties in interest for a reconveyance of the

lands, the law implies an agreement on the part of Waterman to pay the debt due the Bank of Fort Madison, out of the proceeds of the lands conveyed to him. When it is conceded, as it has been by counsel, and must be under the facts of this case, that the conveyance was neither fraudulent in intention or result, and that it was intended that the grantees should have power to sell the lands and give a good title to them, it necessarily follows that as between the parties to the agreement and bound thereby, there was no lien in favor of the parties upon the land so reconveyed. If there was no lien upon the land, and no right to have it declared to be a trust property in a court of equity in the hands of the grantee, then, clearly, there was no right to claim the proceeds of said property, and, therefore, no right to a decree against the estate of Waterman. It must be borne in mind that the lands were reconveyed upon a good and sufficient consideration, after breach of the condition upon which they had been conveyed to the trustee. The company had assumed and agreed to pay the incumbrances and taxes upon the land conveyed to the trustee, and by the reconveyance it was relieved from its obligation in that regard, which was a good and valuble consideration for the reconveyance.

The question here to be decided is the same as though the suit was being prosecuted by Joseph A. Smith and Charles Brewster, as individuals. Smith testifies that he and Brewster owned the bank in equal shares, and were its president and cashier. (Rec., 54 and 55.) The bank was strictly a private corporation, and all its stockholders and officers participated in and were benefited by the transaction which is now complained of.

By the agreement under which the reconveyance was

made, benefits enured to Smith and Brewster, not only as individuals but also as the sole proprietors of the Fort Madison Bank, viz: priority in payment of the bank's claims by the receiver. " In equity the conception of a " corporate entity is used merely as a formula for work- " ing out the rights and equities of the real parties in in- " terest." " The previous assent of all the shareholders of a " corporation has the same consequences as a subsequent " ratification. It is in fact and in law the assent of the " company."

Morowitz Corp., Sects. 227, 228.
Des Moines Gas Co. v. *West*, 50 Ia., 16.

If the debt had been due Smith and Brewster as individuals, could they immediately upon the reconveyance to Waterman have filed a bill to charge the land conveyed to him with a trust or a lien for the payment of their debt, the company being insolvent at that date? Clearly not.

There was no agreement that the lands conveyed should be subject to any lien or that they should be held in trust. The suit could only be maintained upon the ground that the reconveyance of the lands was a fraud in law or a breach of trust. Smith and Brewster having joined in the agreement for the reconveyance and profited thereby, could not in a court of equity claim that the agreement for a reconveyance or anything done in pursuance of the agreement was a fraud or a breach of trust. Indeed counsel seeing the force of this position have expressly disclaimed any charge of fraud or breach of trust, but if the conveyance was not a fraud in law or a breach of trust then we fail to see any ground upon which to base an implied agreement by Waterman to pay the debt due to appellant.

The conveyance to Waterman was not, in fact or in law, a fraud or a breach of trust. The lands were conveyed to a trustee upon certain conditions, which conditions had been broken, and the parties were entitled to a reconveyance of the lands. Clearly, the parties conveying the lands to Beck as trustee, were either entitled to have the condition performed or the land reconveyed. Not only had the conditions been broken but performance had become impossible. As recited in a resolution offered by Brewster, it was considered not only that it was impossible for the company to perform the conditions of the deed to Beck, but that it was for the best interests of the creditors as well as the stockholders that the lands should be conveyed to the original parties. The conveyance was also made for a good and valuable consideration, *i. e.*, the company was relieved of its obligation to discharge the unpaid purchase money due thereon. It is apparent from the circumstances and the acts of the parties that it was contemplated that the several parties should, by the reconveyance, take a good title to the lands reconveyed, which would not be the case if they were charged with a trust to pay all the debts of the corporation. It is true that in certain affidavits filed after the hearing of this case, the Iowa parties stated "that affiant "understood that the lands at said meeting agreed to be "reconveyed to the stockholders, or the proceeds of the "sales of such lands, should be subject to the payment of "any deficiency which might occur in the funds of said re-"ceiver to satisfy in full the indebtedness to be found due "the Bank of Fort Madison." (Rec., 93.) It is clear that this understanding, stated in this affidavit and in other affidavits, is an afterthought after the hearing. If the parties had understood that they were entitled to have the deficiency

paid out of the proceeds of the sales of the lands deeded to Waterman, it is inconceivable that when the claim was filed in the county court and the bill was filed in this case, that no mention should have been made of such claim. The parties clearly would not have undertaken to repudiate their written agreement in regard to the mode in which the payment of the stock subscription should be made, and to hold Waterman upon his stock subscription after he had fully paid it as agreed between the parties in good faith, and yet have said nothing about their right to be paid out of the proceeds of the lands conveyed to him, if they had understood such right existed. Another bill in chancery was filed by the Fort Madison parties whose affidavits were filed in this case, seeking to recover upon the same notes upon which this suit is brought and signed by all of said parties personally, in which no right is made or set up to have the debt paid out of the proceeds of the lands conveyed to Waterman. (Rec., 83 to 87.) It is perfecly clear from the acts of the parties and the claims made by them, that they did not believe or understand they had any right to have the debt in question paid out of the proceeds of the lands conveyed to Waterman. The only grounds of relief set up by any of the parties prior to the decision of this court in the case of *Coit* v. *Gold Amalgamating Company*, *supra*, were based upon the alleged liability of Waterman upon his stock subscription and the firm endorsement of Ketchum & Waterman. Counsel for appellant dwell upon the hardship of Waterman's estate going free, and the two smallest stockholders bearing the entire loss, and represent Waterman as having sustained no loss by the formation and collapse of the company and having received four-sevenths of the assets of the company. This

statement is very unfair. Waterman owned only two-sevenths of the stock of the Black River Lumber Company, and received a reconveyance in his own right of only two-sevenths of the lands. The two-sevenths belonging to the Ketchums were reconveyed to him only by way of mortgage. The extent of the encumbrance secured thereby is not disclosed by the record. It is not claimed Ketchum was insolvent at the time of such mortgage or that Waterman could not have made his debt without such reconveyance of the Ketchum interest to him. It is not even alleged in the bill that the Ketchum lands were conveyed to Waterman or that he ever received any proceeds therefrom. So far as the Ketchum lands are concerned, the transaction is upon the same footing as though the Ketchum lands had been reconveyed to Ketchum and then mortgaged to Waterman. It is admitted by counsel it was the intention the parties should have the power to dispose of the lands and convey a good title thereto which would involve a right to mortgage. Appellant was in no way prejudiced by the conveyance of the Ketchum lands to Waterman instead of their being reconveyed to Ketchum, and it does not appear and it is not alleged in the bill that Waterman profited thereby. In regard to the allegation that Waterman did not lose a cent by the formation or collapse of the company, while it is foreign to the merits, it does appear that vast quantities of timber was cut from the land conveyed by Waterman to the Black River Lumber Company, and for the timber so cut Waterman never received one penny. The moneys sought to be recovered here were to a large extent agreed to be advanced by all of the Fort Madison parties who owned a larger interest in the company than Waterman, they having three-sevenths and he only two-

sevenths. If the moneys were not in fact advanced by all the Fort Madison parties, it was advanced by the bank upon their endorsement and guarantees, and counsel states that all the parties are solvent and responsible. As appears from this record all of the Fort Madison parties filed a bill in their individual names to recover these same moneys, alleging over their own signatures that they had advanced the same. This suit is prosecuted for their benefit. They owned three-sevenths of the stock, and now after Waterman's death they are seeking through the medium of a suit by appellant to make his estate bear the whole losses of the Black River Lumber Company.

III.

APPELLANT IS BARRED FROM RELIEF IN THIS SUIT BY NOT HAVING PURSUED ITS REMEDY IN THE WISCONSIN SUIT.

In 1880 a receiver was appointed of the property of the Black River Lumber Company, the order being in the words and figures following: "Ordered, that the said "William R. Sill be and he is hereby appointed receiver "of *all the property, assets and effects of the said Black "River Company, or held by it.* That the said receiver "give a bond, with surety in the sum of $25,000, to "Charles Smith, as clerk of this court, to be approved by "the judge of this court. Also, ordered, that the said re- "ceiver have the usual power as such receiver, and all the "rights and powers conferred upon him by the said "stipulation presented to this court, as above set forth." (Rec., 89.)

Appellant was a party to the suit, and according to the allegation of the bill in this case, the Black River Lumber

Company was insolvent at the date of the appointment of said receiver. All the lands reconveyed to Waterman and the other stockholders were situated in the State of Wisconsin, and were within the jurisdiction of the court appointing the receiver. The lands were not reconveyed until two years after the appointment of the receiver, and the receivership was not settled until nearly two years after the reconveyance of the lands to Waterman and others. It is clear that whatever may have been the origin of the Wisconsin suit its scope was broad enough under the receivership to have provided for the payment of all the debts of the company. Instead of pursuing this course all the parties in interest agreed upon a disposition of the lands under which the company was relieved from all liability in connection therewith, and in consideration thereof the lands were relieved from the trust upon which they were held by Judge Beck.

See *Terry* v. *Anderson*, 95 U. S., 636.

IV.

A CREDITOR MUST HAVE A JUDGMENT AGAINST HIS DEBTOR BEFORE HE CAN INVOKE THE AID OF A COURT OF EQUITY TO REACH EQUITABLE ASSETS OF THE DEBTOR.

To obviate this objection appellant, in its bill, alleges that the Black River Lumber Company was dissolved on April 17, 1882, and that by reason thereof appellant was unable to obtain a judgment at law against the Black River Lumber Company. We do not think the evidence sustains the allegation that the Black River Lumber Company was dissolved, as alleged, but whatever may have been the effect of its suspension of business, it is clear

that under the provisions of the statutes of Wisconsin a judgment at law could have been obtained against the Black River Lumber Company by appellant.

Section 1,764 of the revised statutes of 1878 is as follows:

"All corporations whose terms of existence shall expire "by their own limitation, or which shall be voluntarily "dissolved in the manner provided by law or by its arti- "cles of association, or shall be annulled by forfeiture or "otherwise, shall nevertheless continue to be bodies cor- "porate for three years thereafter, for the purpose of "prosecuting and defending actions, etc."

It is clear that the right to sue the corporation existed at the date of the commencement of this suit, February 17, 1885.

Appellant contends that it has the right to maintain this suit without judgment, under section 1,755 of the revised statutes of Wisconsin.

This we deny upon two grounds. The section in question only authorizes a suit when the capital stock of the corporation shall have been diminished by a corporate vote of the stockholders. There is no allegation in appellant's bill that the reconveyance to Waterman was in pursuance of a corporate vote of the stockholders, or that the capital stock of the corporation was thereby diminished; both of which allegations are essential to a right to maintain a suit under the Wisconsin statute. It will be remembered that the sole allegation of the bill is, that Waterman conveyed the land to Beck as trustee upon certain conditions, and that Beck reconveyed the lands to Waterman. Again the provision of the statute is, that an action may be brought by a creditor, or lawfully appointed

receiver or assignee. A proper construction of this statute would not make the remedies concurrent, but would give a right of action to a creditor where there was no receiver or assignee. In this case a receiver was appointed, and our contention is that he alone could have brought a suit under the provisions of the Wisconsin statute.

V.

THE CIRCUIT COURT DID NOT ERR IN DENYING THE APPELLANT'S PETITION FOR A REHEARING.

The hearing of this case before the circuit judge was concluded and the cause taken under advisement after argument of counsel on the 4th day of June, 1887. The petition for rehearing was filed on the 16th day of June, and the ground upon which the petition is based is stated in the affidavits of Theodore Sheldon and Thomas D. Jones, solicitors for appellant, filed in support of said petition, the ground being surprise on the part of counsel at the view which the court took of the evidence in the case. (Rec., 94-5.) As the circuit judge well said, in passing upon the petition, if such surprise was good ground for a rehearing, there would be no end of rehearings. The petition was clearly addressed to the discretion of the court, and its refusal cannot be assigned for error here. A rehearing was desired for the purpose of examining certain witnesses whose affidavits were submitted with the petition. The parties making these affidavits do not therein state anything that was said or done affecting the merits of this case, but only what they understood, and their affidavits are wholly inconsistent with the bill filed by the same parties against

appellees, signed by each of them individually. (Rec., 83–87.) It is inconceivable that all the parties in Fort Madison should have "understood that the lands agreed "to be reconveyed to the stockholders, or the proceeds of "the sale of such lands, should be subject to the payment "of any deficiency which might accrue in the funds of "said receiver to satisfy in full the indebtedness to be "found due the Bank of Fort Madison," and yet not have set up any claim based upon such understanding, either in the claim filed in the County court of DeKalb county or in the two bills in the Circuit court of the United States. No such claim was ever made by any one until it became evident that the Waterman estate could not be held upon his subscription to the stock of the Black River Lumber Company. All the parties residing at Fort Madison, Iowa, are parties in interest in this suit, except Judge Beck—Smith and Brewster as owners of the bank, and the other parties as endorsers, or guarantors, upon the paper held by the bank. The ground of relief now set up is clearly an afterthought, after all other grounds for holding the Waterman estate have failed. The court did not err in refusing a rehearing to allow parties in interest to testify against a dead man's estate as to what they *understood*, especially when the understanding proposed to be established was wholly at variance with the acts of the parties.

VI.

WATERMAN WAS NOT BOUND BY THE ENDORSEMENT MADE BY KETCHUM IN THE FIRM NAME OF KETCHUM & WATERMAN, UPON THE TEN THOUSAND DOLLAR NOTE HELD BY APPELLANT.

The note in question was given for money advanced to the Black River Lumber Company. The endorsement by Ketchum in the firm name of Ketchum & Waterman, was an accommodation endorsement or guaranty. "No "party has any authority implied from the mere fact of "partnership, to become surety for any debt in any way "and bind the partnership thereby."

Parsons on Partnership, page 226, and authorities cited.

Counsel in their brief claim that Ketchum & Waterman were joint makers of the note, but by the bill Waterman is sought to be charged only as a guarantor. (Rec., 14.) See also Smith's evidence. (Rec., 50.) Even if Ketchum had given the firm note it would not have bound Waterman, as Ketchum had no authority to give the firm note for the debt of a third party.

The bank, when it discounted the note, advanced the money directly to the Black River Lumber Company, and it therefore knew that the money was not advanced to the firm of Ketchum & Waterman. It is not claimed that the firm of Ketchum & Waterman had ever guaranteed or become security upon any other note; nor is it claimed that this particular endorsement was made with the knowledge or consent of Waterman. The partnership agreements between Ketchum & Waterman are

shown upon pages 82 and 83 of the record. No question arising in this case about Waterman having held out Ketchum as being authorized to make the endorsement, Waterman can only be held, if in fact Ketchum had authority to bind him, by the endorsement. Whether he had such right depends upon the written articles of the agreement, and the circumstances under which the endorsement was made. No authority, whatever, will be found in the articles of partnership for the making of the guaranty in question. The land conveyed to the Black River Lumber Company was not owned by Ketchum & Waterman as partners, but as tenants in common. Under the agreement forming the Black River Lumber Company, each party was to receive stock for the interest owned by him in the land conveyed as a tenant in common. The stock was subscribed for by the individuals and issued to them in the same capacity. Even if the property conveyed had been partnership property, the stock issued upon individual subscriptions would have been individual and not firm property.

See *Singer et al* v. *Carpenter Extr.*, 125 Ill., 117.

Even if the firm of Ketcham & Waterman had owned stock in the Black River Lumber Company, it would not have authorized the endorsement in question; neither is Waterman bound by the endorsement, because some incidental benefit might have accrued to Waterman from the endorsement. The question is one of agency. Ketcham was not authorized to bind Waterman to pay the debts of the Black River Lumber Company, because the Black River Lumber Company had assumed and agreed to pay some of Waterman's debts. If this proposition were true

then a member of any firm would have a right to guarantee the payment of all debts due the debtors of the firm.

There are several statements in this connection in the brief of counsel for appellants upon which we take issue. It is stated that "Waterman & Ketcham together owned four-" sevenths of the entire capital of the Black River Lum-" ber Company, making the firm of Ketcham & Water-" man practically the owners of the lumber company;" and again "after the conveyance to Judge Beck the firm " continued its business, which consisted of the manage-" ment of the affairs of the lumber company, the dispo-" sition of the remaining five thousand acres and the " timber thereon, and the sale of the timber previously " cut by the firm from the 25,000 acres." "The business " of the firm and the lumber company was the same." (Brief, 36.) In point of fact the Ketchams and the Fort Madison stockholders owned more than two-thirds of the stock of the Black River Lumber Company, and between them they managed its affairs. Waterman was a resident of Sycamore, in the State of Illinois, not familiar with the lumber business, and never actively participated in the management of the affairs of the Black River Lumber Company. The statement in the brief that the firm of Ketchum & Waterman managed the business of the lumber company is wholly and utterly without any foundation whatever, either in or out of the record.

William A. Suter, a witness called by appellant, testified that he was the bookkeeper of the firm of Ketchum & Waterman from May, 1879. He testified: "I was " with them for a year, although during the latter part of " the year I was with them, it was practically settling up " old matters, as the firm was not doing any business."

"Q. Do you remember when the Black River Lum-
"ber Company was formed?

"About the time; I do not recollect just when.

"Q. It was some time in the fall of 1879, wasn't it?

"A. I think it was in the fall of 1879.

"Q. Do you understand that the firm of Ketchum
"& Waterman, as a firm, were in existence doing business
"after the formation of the Black River Lumber Com-
"pany?

"A. Yes, sir.

"Q. What business do you understand they were do-
"ing after the formation of that company?

"A. It was principally settling up their former busi-
"ness.

"Q. Did you understand that the firm of Ketchum &
"Waterman did any new logging business after the Black
"River Lumber Company was formed?

"A. No, sir.

"Q. All they had to do after the Black River Lum-
"ber Company was formed was to take care of their old
"logs that came out and settle up their old business?

"A. Yes, sir." (Rec., 66–68.)

Forrest J. Smith, a witness called by appellant, testified that he was in the employ of Ketchum & Waterman from August, 1879, until the formation of the Black River Lumber Company in October of the same year. He testifies:

"Q. After the formation of the Black River Lumber
"Company the firm of Ketchum & Waterman did no
"other business than to take care of their logs they got
"the year before and settling up accounts?

"A. That is all." (Rec., 73.)

It is true the last witness stated that the business of the firm and the Black River Lumber Company was the same, viz: the getting out of logs from the Black river; that is to say the Black River Lumber Company engaged in the same business that the firm of Ketchum & Waterman had been engaged in. If this is what counsel for appellant mean in their brief by saying that the business of the company and the firm was the same, *i. e.*, the same kind of business or that the company succeeded to the business of the firm, we do not see its relevancy to the question at issue, but if they mean there was an identity in the business, that is, that the business of the company was the business of the firm, then there is no foundation for the statement. Again counsel contend that it was of vital interest to the firm of Ketchum & Waterman that the Black River Lumber Company should not become insolvent as by the insolvency the firm of Ketchum & Waterman would be compelled to pay the mortgage of $75,000 upon the land conveyed to Beck, as trustee. It will be remembered that the land conveyed was owned by Ketchum & Waterman as tenants in common, and not as partners, and that the liability for the mortgage upon the land was not a firm liability and that Waterman was amply protected from any loss upon said mortgage by the land being held by Beck, as trustee, for the payment of said mortgage, it not being denied that the land was ample in value to pay therefor. Waterman was in no way interested in the affairs of the Black River Lumber Company or its solvency, except as an individual stockholder of said company and also in connection with his individual liability for the purchase money of the land conveyed by him to Beck against which liability he was amply protected, as we have seen. He never reaped any benefit what-

ever from the endorsement by Ketchum of the ten thousand dollar note in question. The statement that the money would not have been advanced without such endorsement may well be doubted. It appears that an additional loan of a like sum of $10,000 was made by the bank eight days later without any endorsement by the firm of Ketchum & Waterman. (Rec., 13.) Again it is contended by counsel for appellant, that even if the endorsement by Ketchum upon the ten thousand dollar note did not bind Waterman, still he is liable to pay the same. (Brief, 46.) The claim of counsel for appellant seems to be, in substance, that Ketchum was liable on this endorsement and that the Bank of Fort Madison had a lien upon his interest in the land conveyed to the Black River Lumber Company by Ketchum; that this land was mortgaged to Waterman and that therefore Waterman's estate should pay the note endorsed by Ketchum. To this, we reply that there is no claim for any such relief made in the bill; that the Bank of Fort Madison had no lien for the payment of such note upon any lands in the hands of Beck as trustee. It is not claimed that Ketchum was insolvent at the date of the mortgage of his interest in the land to Waterman, or that Waterman has received anything more out of the proceeds of the land than what was due him upon his mortgage. Neither Waterman nor his estate, so far as appears from the record, has ever had any money belonging to Ketchum. In fact, neither Waterman nor his estate has, at any time, owed Ketchum anything. We do not see why Waterman's estate should pay Ketchum's debt to the bank because Waterman collected his own debt from Ketchum. If the bank, by reason of the endorsement, had a lien on Ketchum's interest

in the lands conveyed to Beck, it being a simple contract liability, why would not all the other creditors of Ketchum have a lien upon this land, including Waterman? What superior equity would the bank have over and above Waterman? It appears from this record that part of Ketchum's liability to Waterman arose out of Waterman's advancing the money to pay an installment of purchase money on the very land reconveyed to Waterman, and it does not appear that any other indebtedness was secured by the mortgage to Waterman or paid to him out of the proceeds of the land.

The claim seems to be that because Waterman received out of Ketchum's interest in the lands conveyed to Beck, the purchase money which he had advanced for Ketchum, that, therefore, Waterman's estate should pay Ketchum's individual debt to appellant.

Counsel state that notice of the non-payment of the note endorsed by Ketchum was sent to Waterman, and that "he made no denial of the authority of Ketchum to so en-"dorse the note until more than two years had gone by "when he raised the question for the first time at the "stockholder's meeting in 1882, and desired a release "from his liability." "The amount due on the note is "$10,000, and interest at eight per cent. per annum, since "June 25, 1880." (Brief, 37.)

There is no evidence that any notice of protest was sent to Waterman, or when he first knew of the indorsement. The note matured June 25, 1880. J. A. Smith testified that he did not know when Waterman first knew of endorsement. (Rec. 51.)

The date of the informal meeting of the stockholders at Fort Madison is not shown, but it must have been prior

to April 20, 1881, at which date a formal meeting of the stockholders seems to have been held in Wisconsin as the result of the conference in Iowa, (Rec., 95.) Less than ten months intervened between the maturity of the note and the meeting of the stockholders at which it is shown Waterman denied that Ketchum had authority to make the endorsement in the firm name. (Rec., 76.) It does not appear that there was any acquiescence whatever on the part of Waterman. If he was alive it would doubtless have been shown that his denial was prompt and decided. As it is, no delay whatever is shown by the proofs in the record.

By the decree of the Wisconsin court the funds in the hands of the receiver were ordered to be applied to the payment of the note in question after the payment of two drafts and a note upon which there was due, about $8,000. (Rec., 16). Appellant received under this decree nearly $14,000. (Rec., 48.)

We respectfully submit that the decree dismissing appellant's bill was not erroneous and should be affirmed.

JOHN P. WILSON,
Sol'r. for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1888.

IN EQUITY.

THE BANK OF FORT MADISON,
Appellant,

vs.

PHILANDER M. ALDEN ET AL.,
Appellees.

APPEAL FROM THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANT'S BRIEF IN REPLY.

THEODORE SHELDON,
SOLICITOR FOR APPELLANT.

HENRY STRONG,
OF COUNSEL.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1888.

THE BANK OF FORT MADISON,
Appellant,
vs.
PHILANDER M. ALDEN ET AL.,
Appellees.

Appeal from Northern District of Illinois.

IN EQUITY.

REPLY.

Appellant's brief in this case was directed entirely to the points of contention actually developed at the hearing in the court below. In appellee's brief the chief emphasis is laid upon points barely suggested at the hearing below. This fact makes a brief reply from appellant seem necessary. We shall take the points made by appellee's brief in the order in which they are therein made.

I.

Appellees now allege that the allegations of the bill are not sufficient to warrant the relief now sought.

It is true, as stated by counsel, that this case was at

issue and the evidence closed before the case of *Coit* v. *The Gold Amalgamating Company*, 119 U. S., 343, was decided by this court, and that, in consequence of that decision, appellant did not at the hearing below and does not now press its claim against the estate of Waterman on the ground that Waterman's subscription was not originally paid up. But every essential fact upon which appellant now relies for relief is stated in the bill. Certain property is therein alleged to have been conveyed by specific persons, among them James S. Waterman, to Joseph M. Beck as trustee for the benefit of the Black River Lumber Company. Appellant is therein alleged to be a creditor—the only remaining unpaid creditors of that company. That company is therein alleged to have become wholly insolvent and practically non-existent. By force of the facts alleged in the bill, and established by the evidence beyond controversy, the property so held by the trustee became a trust fund, for the benefit of appellant as such unpaid creditor, upon which fund appellant, as such creditor, had an equitable lien. The bill further alleges that the property constituting this trust fund was subsequently reconveyed by the trustee, Judge Beck, to the same person who had originally conveyed the same to him. (The fact that to protect the trustee the lands were first conveyed to the company, and simultaneously reconveyed by it to the stockholders, is wholly immaterial. The object intended and accomplished was a transfer from Judge Beck to the stockolders.) The facts above stated are all of the essential facts out of which the main question in this controversy arises, namely, whether by virtue of such transfer the property so transferred was divested of the character of a trust fund. If it was so divested, then the appellant

fails upon this branch of the case. If it was not so divested then the transfer simply operated to substitute several trustees instead of one, and, in the absence of any defense to be disclosed by these several trustees, appellant has a right to call upon either or all of them for an accounting.

Appellee's brief tends to create the impression that the reconveyances from Judge Beck to the stockholders are the source of whatever rights appellant may now have. This is true only in a very unimportant sense. The trust character which we claim attaches to the property, was in no sense whatever impressed upon that property by the reconveyance. On the contrary that character attaches to the property in the hands of Judge Beck, and if that character attaches to the property now, it so attaches notwithstanding the reconveyance, and not because of it. The same amplitude and certainty of allegation which might reasonably be required concerning the reconveyance if that were an actual source of title is not requisite when, as in this case, the reconveyance was only the incident which connected Waterman and connects his estate with a pre-existing trust.

We submit therefore that by establishing an equitable lien upon this property while in the hands of Judge Beck, we establish a *prima facie* right to follow it into the hands of any person or persons taking it with full knowledge of the facts, and therefore that the burden of proof lies upon appellees to show that the property came into the hands of Waterman discharged of the trust attaching to it in the hands of Judge Beck. And if we are correct in this, then no further allegations are required of appellant unless and until appellees establish facts constituting a *prima facie* defense.

The relief which we now seek is not specifically prayed for in the bill. But the bill contains the general prayer that complainant "be further and otherwise relieved in "the premises as the nature of the case may require, and "according to equity and good conscience may deem "proper." (Rec., 15.)

Under the decisions of this court this general prayer would extend to any relief that is agreeable to the case, made by the bill.

And in the case *Walden* v. *Bodley*, 14 Pet., 156, this court said: "A court of equity cannot act upon a case "which is not fairly made by the *bill and answer*. But it "is not necessary that these should point out in detail the "means which the court should adopt in giving relief. Un- "der the general prayer for relief, the court will often ex- "tend relief beyond the specific prayer, and not exactly in "accordance with it."

The answer in the case at bar contains a circumstantial account of the reconveyances by Judge Beck to the stockholders. (Rec., 39–42.) And if, as the passage above quoted from *Walden* v. *Bodley*, seems to suggest, resort may be had to the answer for amplification of the allegations of the bill all pretense of deficiency of allegations disappears. It has been repeatedly held by other courts that when the facts are defectively stated in the bill, relief may be granted upon the facts stated in the answer.

Rose v. *Mynatt*, 7 Yerg., 30.
Maury v. *Lewis*, 10 Yerg., 115.
McLaughlin v. *Daniel*, 8 Dana, 184.
Dealty v. *Murphy*, 3 A. K. Marsh, 474.

Counsel for appellees now claim in their brief that if issue had been made upon the reconveyances, "the facts

"disclosed by the evidence might, and doubtless would "have been different." This is a mild claim of surprise but mild as it is, it is sufficiently hollow. Appellees establish by their own testimony that the meeting at Ft. Madison in April, 1882, at which their reconveyance was determined upon and carried out, were informal meetings of stockholders of which no record was kept (Rec., 137,) that in fact "the meeting was not recognized as a meet-"ing of stockholders; it was only recognized as a meet-"ing of individuals interested in the property." (Rec., 138.) All the persons living, who were present at that meeting are on record here either in depositions (Joseph A. Smith for appellants, Rec., 80, 114, and Milo Smith for appellees, Rec., 135, 143), or in affidavits (Samuel Atlee, Rec., 165, 166, W. H. Kretzinger, Rec., 166, Charles Brewster, Rec., 167, and Joseph M. Beck, the trustee, Rec., 169, 170.) The affidavits are unfortunately not evidence in this case, and our only warrant in referring to them in this connection is this reference of counsel for appellees to the possible existence of other evidence bearing on the point at issue; and also the fact that counsel has referred to matter contained in the similarly situated affidavit of D. J. Carnes (Brief, 16, 17,). The affidavit of Mr. Justice Beck, the trustee who had no interest on either side, is tolerably conclusive as to whether further evidence "might, and doubtless would, have been "different." The most satisfactory account which the record contains of the scope and object of the negotiations at the final Ft. Madison meetings, is furnished by the deposition of Milo Smith on behalf of appellees. After drawing from the witness a full account of the transaction (Rec., 136, 138,) counsel was not satisfied, and went in search of more of the evidence which "might and doubt-

"less would have been different" and with this result. (Rec., 139):

"Mr. WILSON: Have you stated fully the agreement "between the parties in regard to the reconveyance and "the release of the judgment on your part? If not, state "further what was said at that time?

"A. I don't recollect anything that is material, but of "course, during the negotiations there was a vast amount "of talk there all day long, and it took away into the "nightbefore it was closed up finally.

"Q. What was the *complete agreement* that was made, "as you understood it there, between the parties?

"A. The agreement was that the land that the Fort "Madison parties had conveyed to Judge Beck, as trustee, "was to be conveyed to them; that the land that Ketchum "and Waterman had conveyed to him was to be recon-"veyed to J. S. Waterman, and I was to release the judg-"ment lien on the Fort Madison portion of the land.

"Q. Was there anything said about the claim of the "bank at Fort Madison?

"A. Not that I know of at that time; I didn't hear any "discussion about it; *that didn't connect itself with the "transfer of the land.*

"Q. Didn't connect itself with the release of the judg-"ment on your part?

"A. No."

In fact, the answer of defendants, their own proofs, and the cross-examination of Joseph Smith by their counsel, show that the defense mainly relied upon throughout and pressed practically to the exclusion of all other defenses at the hearing below was that this very agreement which now takes them by surprise, effected a complete settlement between the parties, including the claim now sued upon.

II.

Under the second head of appellee's brief, four separate and distinct defenses are brought together and more or less skillfully blended so as to look like one. We prefer to take them separately, for if each is invalid no validity can issue from the compound. These several defenses are:

1st. That "the lands were conveyed to a trustee upon "certain conditions, which conditions had been broken," hence the lands were forfeited by the company. (Brief, 12–18 and 21.)

2nd. That the lands reconveyed were "for a good and "valuable consideration, *i. e.*, the company was relieved "of its obligation to discharge the unpaid purchase "money due thereon." (Brief, 19 and 21.)

3d. That as Joseph A. Smith and Charles Brewster owned all the stock of the Bank of Fort Madison, that bank lost all right to follow the lands or the proceeds, by the participation of those gentlemen in the transaction. (Brief, 19, 20.)

4th. That another bill in chancery was filed by the Fort Madison stockholders of the Black River Lumber Company, in their own names for this same claim against appellees.

1st. As to the alleged forfeiture.

The main difficulty about this is that it is not supported by an atom of evidence. It is true that the company was to pay off the purchase-money mortgages; but the stockholders had contemplated the difficulty of its doing so as the notes matured, and they provided for the difficulty in

the contract preliminary to the formation of the lumber company. That contract contemplated the taking up of purchase-money notes by the parties to the contract, and provision was made therefor as follows: "It is further "agreed that any party taking up any of the purchase-"money notes aforesaid shall retain the same and the se-"curity therefor, which shall have the same operation as "a lien as it had in the hands of prior holder, until paid "by the company." (Rec., 77.) This provision is in addition to the more specific provision made in that contract for the first notes falling due on the Ketchum & Waterman tract, which notes were taken up by Waterman and assigned to his agent, Milo Smith. Counsel say in their brief: "Before the deed of reconveyance was "made, the other installments of purchase money had "matured, but had not been paid by the Black River "Lumber Company." Counsel is his own authority for this statement. No suggestion of the kind appears anywhere in the record. If any of the notes covering the Ketchum & Waterman tract had fallen due, Waterman would quite certainly have taken them up, because he was himself liable upon those notes. But that Waterman never paid any notes subsequent to the Milo Smith notes just mentioned, is established by stipulation of counsel (last clause stipulation No. 4; Rec., 53): "that no por-"tion of the purchase money secured by him as aforesaid "for said tract, has ever been applied by said Waterman "or his executors upon any indebtedness of said lumber "company, except to the extent of the satisfaction of a "judgment against said company in favor of Milo Smith, "in the United States Circuit court for the Northern "district of Wisconsin, rendered October 27, 1881, for "$31,163.18."

The condition now set up was not a condition of the tenure of these lands by the trustee, but the condition upon the performance of which the trustee was to convey the lands in fee to the company. If the lands had remained in the hands of the trustee, a creditor could have made the equitable interest of the company in the lands available by performing the condition. And in view of the stipulated value of those lands at the time of the reconveyance (Stipulation No. 4; Rec., 23) a creditor could very well afford to perform that condition.

That this pretended forfeiture is a mere subtlety of counsel, and an afterthought, is shown by the acts of the parties. Appellees had kindly introduced into the record various resolutions passed by the stockholders and directors of the company favoring this redistribution.

The resolutions of April 27, 1888, have a preamble, which explains the reason for the reconveyances:

"WHEREAS, The business of the Black River Lumber "Company has been suspended for several months, aris- "ing from causes within said company, and it is the in- "tention of said company to abandon its organization as "soon as practicable, and the said company does not in- "tend to further prosecute the business for which it was "organized, and it is desirable that the *lands of the corpo-* "*ration* shall be conveyed to the persons who conveyed "the same to the company, or to the persons represent- "ing such former owners." (Rec., 173, 174.)

There is no suggestion of forfeiture here, on the contrary, the lands are correctly described as "the lands of "the corporation."

The resolution introduced by Brewster, of which counsel seeks to make much, declares "that it is expedient

" and for the best interests of the stockholders and cred-
" itors of the company that a division of the *lands of the*
" *company* should be had." (Brief, 17.) We can discover no flavor of forfeiture about that. This resolution was introduced, as counsel says, by Charles Brewster, who, with Joseph A. Smith, owned all the stock of the Bank of Fort Madison. These two men had only about one-twentieth interest each in the lumber company, while the bank had a claim against that company amounting to over $80,000. (See Decree Rec., 28.) We have looked with eagerness through appellee's brief for some explanation of the fact that Brewster, so situated, could have believed the proposed reconveyances to be "for the best " interests" of the "*creditors*" of the lumber company, if such reconveyances were understood by him to extinguish completely and forever all right of those creditors to look to those lands or their proceeds as ultimate security for their claims. Counsel has characterized Brewster's affidavit, among others, as an "afterthought." (Brief, 21.) But the very terms of this resolution introduced fully a year before the reconveyances were actually made, vindicate his declaration that he "understood that the " lands then agreed to be reconveyed to the stockholders "or the proceeds of the sale of such lands, should be sub-" ject to the payment of any deficiency which might oc-" cur." (Rec., 167.)

2d. The second defense mentioned, is that the lands were reconveyed "for good and valuable consider-" ation" to the company. It is scarcely worth while to point out that this defense is wholly inconsistent with the defense of forfeiture for condition broken—blended as the two defenses are under one head. It is more to the point to say that this claim is disposed of by stipulation of

counsel made after all the evidence was in, which stipulation counsel had clearly forgotten.

"8th. That said Black River Lumber Company in "April, 1882, re-conveyed to the original stockholders of "said company, the lands conveyed by them to said Beck "as trustee on account of their stock (conveying, however, "to James S. Waterman all the lands contributed by "Ketchum and Waterman, by and with the consent of "Ketchum, said Ketchum being at the time indebted to "said Waterman, and his share of said lands being con- "veyed to said Waterman as security for such indebtedness) "which said conveyance was made in pursuance of the "unanimous vote, and at the request of all the stockholders "of said company, *and without any consideration being paid "therefor to said company.*" (Rec., 53.)

3rd. The third defense above mentioned, that inasmuch as Joseph A. Smith and Charles Brewster owned all the stock of the Bank of Fort Madison, and assented to the reconveyance, the bank must be held to have released any right which it might otherwise have had to follow the lands or their proceeds—is the defense which appellees mainly relied upon in the court below, though it has now fallen nearly out of sight. This defense is anticipated in appellant's opening brief, (pages 27–31.), and we only wish to say further that the extract quoted in appellee's brief (pages 15–16) from the deposition of Joseph A. Smith, creates, as it stands in the brief, a wholly erroneous impression by reason of its severance from what immediately preceeds, and what immediately follows, in the deposition. The extract is taken from the cross-examination, and counsel had directed witness' attention to the Milo Smith judgment (Rec., 110), as the first question in the extract quoted shows. That the witness did not

have the claim of the bank in mind at all is shown by the redirect examination immediately following:

"Q. Did the Bank of Fort Madison have any hand "that settlement?

"A. No, sir; not the bank.

"Q. Was there any demand made upon the bank at "that time by any of the stockholders that the bank should "ratify that settlement, and release its claim?

"A. No, sir.

"Q. Has the bank ever released its claim in any way?

"A. No, sir.

"Q. Was it a part of that settlement whereby these "lands were reconveyed, that the bank should release its "claim?

"A. No, sir.

"Q. Was there any talk upon this subject?

"A. There was no talk on that subject, to my recol- "lection now."

The extract quoted by appellees, and that which we have just quoted, show how entirely distinct, even in the mind of Joseph A. Smith himself, were his own individual interests as stockholder in the lumber company, and the interest of the Bank of Fort Madison as a creditor of that company. And that distinction was evidently assumed as a matter of course by all the parties to the transaction. For Milo Smith, appellees' witness, and the only other witness to the transaction, agrees entirely with Joseph A. Smith on this point, as on all other material points, that that the claim of the bank was not even mentioned, "didn't connect itself with the transfer of the land," as Milo Smith tersely puts it. (Rec., 139.)

4th. Appellees complain that in another suit upon the

same indebtedness, the several Iowa stockholders were alleged to be the owners of the notes forming the basis of the present claim of the bank. From a list of the notes set out in the bill of complaint (Rec., 24,) it will be seen that a considerable part of the money advanced by the bank to the lumber company was advanced upon notes given by that company to the Iowa stockholders of the lumber company. Upon all these notes, as well as upon all the notes drawn directly to the bank, the money was advanced by the bank alone. At the beginning of these proceedings appellants' counsel were not fully informed of the facts concerning the ownership of these notes, and a bill was filed in the name of the original payees of the notes. Upon learning the facts, the bill was promptly dismissed. There has never been a shadow of a doubt among the parties themselves as to the ownership of these notes. The claims were originally filed in the Wisconsin suit in the name of the bank, and the decree of that court finds that the amount was owing to the bank.

III.

Appellees next seek to set up the Wisconsin suit in bar of this suit.

What was said in appellant's opening brief (pages 22–24), to which we beg to refer, sufficiently indicates the wide difference between the case at bar and the case of *Terry* v. *Anderson*, 95 U. S., 636, cited by appellees. The language of the court in the latter suit itself calls attention to this difference. In that case the court says: "there was a trustee invested with ample power to col-"lect and dispose of all the assets belonging to the alleged "trust fund." In the Wisconsin suit now set up in bar, there was no such trustee. There was only a receiver

appointed for a specific and limited purpose, who neither regarded himself nor was regarded by anybody else as "invested" with any right or title whatever to any part of or interest in the lands held by the trustee.

IV AND V.

We have said in our opening brief substantially all that we think it necessary to say under these two heads of appellee's brief. (See appellant's opening Brief, 24–27, and 32–33.)

VI.

Concerning the endorsement made by Ketchum upon the $10,000 note, we beg to very briefly reply to one or two observations made by counsel for appellees.

Counsel says (page 31), "the statement in the brief "(for appellant), that the firm of Ketchum & Waterman "managed the business of the lumber company, is wholly "and utterly without any foundation whatever, either in "or out of the record."

Technically, the firm did not manage the affairs of the lumber company; but it is not disputed that, (as stated in our former brief, page 36, immediately after the statement in question), M. M. Ketchum, the junior member of the firm, was the general manager of the lumber company from its formation until it passed into the hands of the receiver in April, 1880. It is not disputed, too, that that he was also during that period acting manager for the firm of Ketchum & Waterman, conducting the business of both the firm and the lumber company. We

therefore feel justified in stating that the firm or some of its members managed the affairs of the lumber company. Such control was both natural and proper for the reason that, in the names of the three members of the firm stood four-sevenths of the entire capital stock of the company. The members of the firm practically owned the lumber company.

Counsel for appellee states "there is no evidence that "any notice of protest of the note was sent to Waterman "or when he first knew of the indorsement." (page 35.)

As a matter of fact, the notarial certificate of protest annexed to the note was duly offered in evidence, although the record does not set forth the certificate in full. Joseph A. Smith, cashier of appellant, however testifies, (Rec., 90), when identifying the note in question, that there was attached to it what purported to be the notary's protest. Upon this evidence, we think it may be presumed that notice of protest was duly mailed Waterman, as certified by the notary.

At page 36 of his brief, counsel for appellee states that by the decree of the Wisconsin court, the receiver has made partial payment of the note in question.

That decree (Rec., 29), directed the application of the assets in the receiver's hands to the payment of the *unsecured* notes and drafts of the lumber company held by appellant. The bank held large amounts of the paper of the lumber company, some of which was secured by indorsements of various stockholders, while the remainder was unsecured. It was the manifest intention of the Wisconsin decree that the receiver's net assets should be applied upon the most recent of the unsecured notes; and we do not think this intention is varied by the fact that the decree, in attempting to describe the last four *unse-*

cured notes of the lumber company, mentions the *secured* note in question, dated March 22, 1880, when it should have named a later *unsecured* note for the same amount, dated March 31, 1880.

Conceding, however, the construction of this decree to be as claimed by appellee's counsel, he is in error as to the balance of the assets available for application upon the note in question. The decree was for $72,366.14. (Rec., 28.) The net assets of the receiver on January 18, 1884, the date of the decree, were $13,860.61. (Rec., 88.) The first note named in the decree to be paid, was for $1,274.-11; the next was for $1,682.21; the third was for $5,000, with interest at eight per cent. from July 11, 1880, to January 18, 1884, amounting, with interest to $6,407.77; in all, $9,364.09; leaving applicable upon the note in question only the sum of $4,496.52. On January 18, 1884, there was due upon this note, $10,000, and interest at eight per cent. from June 25, 1880, in all, $12,850. Applying upon this sum the above available balance, will leave the sum of $8,353.48, which amount, together with interest at eight per cent. since January 18, 1884, by appellee's own construction of the decree, is still due and unpaid upon the note indorsed by Ketchum.

Theodore Sheldon

Solicitor for Appellant.

Henry Strong

Of Counsel.